DOCKET

No. 07-854

Title:	John Van de Kamp, et al., Petitioners v. Thomas Lee Goldstein
Docketed:	January 2, 2008
Lower Ct:	United States Court of Appeals for the Ninth Circuit
Case Nos.:	(06-55537)
Decision Date:	March 28, 2007
Rehearing Denied:	September 20, 2007

Questions Presented

~~Date~~	~~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~~~
Dec 19 2007	Petition for a writ of certiorari filed. (Response due February 1, 2008)
Jan 11 2008	Waiver of right of respondent Thomas Lee Goldstein to respond filed.
Jan 30 2008	DISTRIBUTED for Conference of February 15, 2008.
Jan 31 2008	Response Requested . (Due March 3, 2008)
Jan 31 2008	Brief amicus curiae of Los Angeles County filed.
Feb 1 2008	Brief amici curiae of National District Attorneys Association, et al. filed.
Mar 3 2008	Brief of respondent Thomas Lee Goldstein in opposition filed.
Mar 19 2008	DISTRIBUTED for Conference of April 11, 2008.
Apr 2 2008	Reply of petitioners John Van de Kamp, et al. filed. (Distributed)
Apr 14 2008	Petition GRANTED.
May 9 2008	The time to file the joint appendix and petitioners' brief on the merits is extended to and including June 30, 2008.
Jun 30 2008	Joint appendix filed. (Statement of costs filed)
Jun 30 2008	Brief of petitioners John Van de Kamp, et al. filed.
Jul 3 2008	Brief amicus curiae of Los Angeles County filed.
Jul 3 2008	Brief amicus curiae of New York State District Attorneys Association filed.
Jul 3 2008	Brief amicus curiae of City of New York filed.
Jul 7 2008	Brief amicus curiae of United States filed.
Jul 7 2008	Brief amici curiae of Kansas, et al. filed.
Jul 7 2008	Brief amici curiae of National District Attorneys Association, et al. filed.
Jul 7 2008	Brief amici curiae of National Association of Counties, et al. filed.
Jul 7 2008	Brief amicus curiae of Cook County, Illinois filed.
Jul 17 2008	The time within which to file respondent's brief on the merits is extended to and including August 29, 2008.
Jul 18 2008	Motion of the Acting Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.

Jul 31 2008	CIRCULATED
Aug 7 2008	Record received from the U.S.C.A. for the Ninth Circuit. (1 envelope)
Aug 18 2008	SET FOR ARGUMENT ON Wednesday, November 5, 2008.
Aug 20 2008	Record recevied from the U.S.D.C.f or the Central District of California. (2 boxes). There are sealed documents in this record.
Aug 29 2008	Brief of respondent Thomas Lee Goldstein filed. (Distributed)
Sep 4 2008	Brief amicus curiae of Law Professors filed. (Distributed)
Sep 5 2008	Motion of the Acting Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
Sep 5 2008	Brief amici curiae of Innocence Network and The Innocence Project filed. (Distributed)
Sep 5 2008	Brief amicus curiae of Constitutional Accountability Center filed. (Distributed)
Sep 5 2008	Brief amici curiae of American Civil Liberties Union, et al. filed. (Distributed)
Sep 29 2008	Reply of petitioners John Van de Kamp, et al. filed. (Distributed)
Nov 5 2008	Argued. For petitioners: Timothy T. Coates, Los Angeles, Cal.; and Michael R. Dreeben, Deputy Solicitor General, Department of Justice, Washington, D.C. (for United States, as amicus curiae.) For respondent: E. Joshua Rosenkranz, New York, N.Y.

PETITION FOR WRIT OF CERTIORARI

78

Supreme Court, U.S.
FILED
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No. 07-854

In The

Supreme Court of the United States

JOHN VAN DE KAMP and CURT LIVESAY,

Petitioners,

vs.

THOMAS LEE GOLDSTEIN,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1) Where absolute immunity shields an individual prosecutor's decisions regarding the disclosure of informant information in compliance with *Brady v. Maryland,* 373 U.S. 83 (1963) and *Giglio v. United States,* 405 U.S. 150 (1972) made in the course of preparing for the initiation of judicial proceedings or trial in any individual prosecution, may a plaintiff circumvent that immunity by suing one or more supervising prosecutors for purportedly improperly training, supervising, or setting policy with regard to the disclosure of such informant information for all cases prosecuted by his or her agency?

2) Are the decisions of a supervising prosecutor as chief advocate in directing policy concerning, and overseeing training and supervision of, individual prosecutors' compliance with *Brady v. Maryland,* 373 U.S. 83 (1963) and *Giglio v. United States,* 405 U.S. 150 (1972) in the course of preparing for the initiation of judicial proceedings or trial for all cases prosecuted by his or her agency, actions which are "intimately associated with the judicial phase of the criminal process" and hence shielded from liability under *Imbler v. Pachtman,* 424 U.S. 409, 430 (1976)?

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PARTIES TO THE PROCEEDING – Continued

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CITATIONS FOR OPINIONS BELOW

The opinion of the Court of Appeals (Appendix A) is reported at 481 F.3d 1170 (9th Cir. 2007). The decision of the district court denying the petitioners' motion to dismiss (Appendix B) and the order of the Court of Appeals denying the petition for rehearing and rejecting the suggestion for hearing *en banc* (Appendix C) were not reported.

BASIS FOR JURISDICTION IN THIS COURT

The Court of Appeals filed its opinion on March 28, 2007 and amended it on April 4, 2007 to correct a typographical error. That Court denied the petitioners' petition for rehearing and rejected the suggestion for hearing en banc on September 20, 2007. 28 U.S.C. §1254(1) confers jurisdiction on this Court to review on writ of certiorari the opinion of the Court of Appeals.

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

The underlying action was brought by the respondent pursuant to **42 U.S.C. §1983**, which reads as follows:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be

> subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia."

The respondent alleges that the petitioners violated his rights under the Fourth and Fourteenth Amendments to the United States Constitution, the relevant parts of which read as follows:

> ***Fourth Amendment***: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."
>
> ***Fourteenth Amendment (Section 1)***: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and

of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

In his operative Second Amended Complaint, the respondent alleged that in 1980 he was convicted of murder "entirely on the perjured testimony of two witnesses suborned by the Long Beach [California] Police officers." Appellants' Excerpts of Record [AER] at page 14, lines 11-12. One of those witnesses was a jailhouse informant, Edward Fink. AER at 23, 26-27. During the course of his testimony, Fink denied having received any benefit for cooperating in the prosecution of the respondent. The complaint alleges that this denial was untrue. AER at 28-30. The respondent acknowledged that the deputy district attorneys who prosecuted him were never informed of the benefits Fink had received. AER at 32. In December, 2002 the respondent's conviction was vacated by the United States District Court for the Central District of California, and the United States Court of Appeals for the Ninth Circuit affirmed that decision a year later. AER at 14-15.

The respondent filed this lawsuit in the United States District Court for the Central District of California on November 29, 2004. AER at 66. On December 29, 2005 the respondent filed his Second Amended Complaint, which for the first time named as defendants petitioners John Van de Kamp and Curt Livesay. AER at 13. Mr. Van de Kamp was the Los Angeles County District Attorney and Mr. Livesay was his chief deputy twenty-five years earlier when the respondent was prosecuted and convicted. AER at 51. The stated statutory basis for jurisdiction of the respondent's action in the district court was 28 U.S.C. §§1331 and 1343(4). AER at 14.

The respondent alleged that, "[p]rior, during and subsequent to the prosecution of Mr. Goldstein, the Los Angeles County District Attorney's Office knew of abuses concerning jailhouse informants and of its own failure to record or disseminate that knowledge." AER at 33. He further alleged that the defendants were personally aware of this information, AER at 33, but that they:

> "purposefully or with deliberate indifference failed to create any system for the Deputy District Attorneys handling criminal cases to access information pertaining to the benefits provided to jailhouse informants and other impeachment information, and failed to train Deputy District Attorneys to disseminate information pertaining to benefits provided to jailhouse informants and other impeachment information."

AER at 34, lines 13-18.

The respondent asserted that because of these alleged actions by Mr. Van de Kamp and Mr. Livesay, "the Deputy District Attorneys on Mr. Goldstein's case[ ] did not have access to any impeachment information including benefits provided to Fink prior to Mr. Goldstein's conviction." AER at 37, lines 25-27. The respondent asserted that Mr. Van de Kamp and Mr. Livesay thus violated his rights by:

> "maintain[ing], enforc[ing], tolerat[ing], permitt[ing], acquiesc[ing] in, and ratif[ying] the administrative policy, practice and custom of failing to disseminate impeachment information, including the benefits jailhouse informants received in exchange for assistance in securing convictions against criminal defendants, and maintain[ing], enforc[ing], tolerat[ing], permitt[ing], acquiesc[ing] in, and ratif[ying] an administrative policy, practice and custom of using confessions obtained by the jailhouse informants that were false and fabricated."

AER at 51, lines 9-15.

The respondent did not contend that either Mr. Van de Kamp or Mr. Livesay personally "knew about, condoned, or directed any specific trial decisions made by the deputy district attorneys prosecuting Goldstein's criminal case." *Goldstein v. City of Long Beach, et al.*, 481 F.3d 1170, 1174 (9th Cir. 2007).

(Since the underlying appeal was taken following the denial of a motion to dismiss, the petitioners have

not yet had an opportunity to contest, or even respond to, the allegations made by the respondent.)

On March 6, 2006, the district court denied the motion to dismiss brought by the petitioners on the ground of absolute prosecutorial immunity. AER at 55; also Appendix B. On April 5, 2006, the petitioners filed a Notice of Interlocutory Appeal from the district court's order. AER at 59. The statutory basis for jurisdiction of the Court of Appeals was 28 U.S.C. §1291, in that this was an appeal from a decision of the district court denying a claim for absolute immunity. See *Mitchell v. Forsyth,* 472 U.S. 511, 525 (1985).

The United States Court of Appeals for the Ninth Circuit affirmed the decision of the district court in a published opinion filed on March 28, 2007. (Appendix A) That Court amended its opinion on April 4, 2007 to correct a typographical error. Thereafter, on September 20, 2007, that Court denied the petitioners' petition for rehearing and rejected the suggestion for hearing en banc. (Appendix C) "A judge requested a vote on whether to rehear this matter en banc. The matter failed to receive a majority of the votes of the nonrecused active judges in favor of en banc consideration." App. 23.

REASONS FOR GRANTING CERTIORARI

The respondent asserts in his complaint that prosecutors did not disclose to his counsel that one of the witnesses against him had received benefits in

exchange for testifying at the respondent's criminal trial. However, there is no dispute that decisions made by an individual prosecutor regarding the disclosure of informant information are covered by the absolute prosecutorial immunity, even if those decisions violate the requirements of *Brady v. Maryland, supra,* 373 U.S. 83 (1963) and *Giglio v. United States, supra,* 405 U.S. 150 (1972).

So the respondent circumvented that immunity by instead suing the petitioners herein – the two senior officials in Los Angeles County District Attorney's office – in their individual capacities, alleging that in violation of *Giglio* they failed to establish a system within their agency to ensure that informant information was made available to all deputy district attorneys. The petitioners moved to dismiss on the ground of the absolute prosecutorial immunity, but both the district court and the Court of Appeals held that the petitioners' actions were administrative, not prosecutorial, and thus not subject to the immunity.

This case thus unambiguously presents basic questions about the extent to which supervisory personnel in public prosecutor's offices are entitled to invoke the absolute prosecutorial immunity:

- When the absolute immunity would shield the decisions of an individual prosecutor made in the course of an individual prosecution, may a plaintiff evade the bar of that immunity by instead suing that prosecutor's supervisors, claiming that the line prosecutor's actions were the result of policy decisions made by

those supervisors or a failure by those supervisors to adequately train and/or supervise the line prosecutor?

- Are the decisions of supervisory personnel in public prosecutor's offices concerning the development and implementation of office-wide policies relating to the manner in which all of the agency's cases are prosecuted by their subordinates, and concerning the training and supervision of those subordinates regarding how the agency's cases are to be prosecuted, acts which are undertaken by those supervising prosecutors "in preparing for the initiation of judicial proceedings or for trial, and which occur in the course of [their] role as an advocate for the State", *Buckley v. Fitzsimmons,* 509 U.S. 259, 261 (1993), so as to make those actions subject to the absolute prosecutorial immunity?

- When supervising prosecutors' policy-making and training and supervision decisions affect the manner in which every prosecution handled by an agency are conducted, are those decisions "intimately associated with the judicial phase of the criminal process" and therefore shielded from liability under *Imbler v. Pachtman, supra,* 424 U.S. 409, 430 (1976)?

Circuit and district courts across the county have split in answering these questions, issuing conflicting decisions, with some courts granting immunity to supervising prosecutors in these situations, while

others (such as the Ninth Circuit in this case) have refused to do so.

If the absolute prosecutorial immunity is not available in situations such as that presented here, it will effectively eliminate the immunity, because virtually any claim that would otherwise be barred against a line prosecutor for his or her actions in regard to an individual prosecution can simply be restated as a claim against one or more supervising prosecutors, asserting that the line prosecutor's actions were the result of a policy decision by that supervisor or a failure on the part of that supervisor to adequately train and/or supervise the line prosecutor. Such claims would almost always have to be litigated at least through summary judgment, and often entirely through trial, to be resolved.

The policies underlying the absolute prosecutorial immunity – the "concern that harassment by unfounded litigation would cause a deflection of the prosecutor's energies from his public duties, and the possibility that he would shade his decisions instead of exercising the independence of judgment required by his public trust", *Imbler, supra,* at 423 – apply just as strongly to supervising prosecutors as to their deputies. There is no more justification for permitting these types of lawsuits to be pursued against supervisors than there would be for entirely eliminating the immunity.

The uncertainty on this issue has lasted for many years, and has resulted in a number of conflicting

lower court decisions. It is time for this Court to step in and settle this important issue of federal law.

1. THE COURT OF APPEALS' OPINION IN THIS CASE ONLY PERMITS SUPERVISING PROSECUTORS TO INVOKE THE ABSOLUTE PROSECUTORIAL IMMUNITY IN THE NARROWEST OF CIRCUMSTANCES

The case that provides the theory underlying the respondent's claim against the petitioners is *Giglio v. United States,* 405 U.S. 150 (1972), in which a criminal defendant, having discovered that "the Government had failed to disclose an alleged promise made to its key witness that he would not be prosecuted if he testified for the Government", asked for a new trial. *Id.* at 150-151. The evidence indicated that the trial prosecutor was not aware of the promise. *Id.* at 152. This Court found that the failure to provide this information to the defendant violated his due process rights and required that he be granted a new trial. *Id.* at 154-155. This Court held that it was irrelevant that the prosecutor who had allegedly made the promise to the defendant had failed to inform his superiors or fellow prosecutors.

> "[W]hether the nondisclosure was a result of negligence or design, it is the responsibility of the prosecutor. The prosecutor's office is an entity and as such it is the spokesman for the Government. A promise made by one attorney must be attributed, for these purposes, to the Government. To the extent this

> places a burden on the large prosecution offices, procedures and regulations can be established to carry that burden and to insure communication of all relevant information on each case to every lawyer who deals with it."

Id. at 154.

The petitioners in this case contended, both in the district court and the Court of Appeals, that regardless whether there was any truth to the respondent's accusations, their supposed actions could not form the basis for liability against them because the alleged actions are subject to the absolute prosecutorial immunity. That immunity applies to actions which are "intimately associated with the judicial phase of the criminal process", *Imbler, supra,* at 430, which the petitioners contended included any responsibilities imposed on prosecutors by this Court in *Giglio.*

As noted above, this Court held in *Giglio* that prosecutors have an obligation to disclose promises made to witnesses and that prosecuting agencies therefore have an obligation to make sure that that information is disseminated among their prosecutors. These petitioners argued that disseminating information from one set of prosecutors to another so that the second set will be able to fulfill their obligations under *Brady v. Maryland,* 373 U.S. 83 (1963) is clearly an "action[ ] that [is] connected with the prosecutor's role in judicial proceedings", *Burns v. Reed,* 500 U.S. 478, 494 (1991), and thus is within *Imbler*'s definition of actions protected by the absolute prosecutorial

immunity. The petitioners contended that they were entitled to the immunity even though what was at issue here were policy decisions allegedly made by Mr. Van de Kamp and Mr. Livesay, rather than decisions made in the context of an individual prosecution.

The respondent argued that the petitioners could not benefit from the immunity because their actions were administrative, not prosecutorial. The district court agreed, holding that the conduct in question was administrative in form, not prosecutorial, and therefore not subject to the prosecutorial immunity. The Court of Appeals affirmed the district court's decision, but on somewhat different grounds.

Even though the appellate court agreed with the petitioners' contention that its holding in *Roe v. City & County of San Francisco,* 109 F.3d 578 (9th Cir. 1997) "establishes that absolute immunity protects not only decisions made during an individual prosecution but may also apply to a policy decision", *Goldstein, supra,* at 1174, and that "it may be possible for an act to be prosecutorial in function but administrative in form", *id.* at 1175, the court nonetheless concluded that the respondent's specific allegations against Mr. Van de Kamp and Mr. Livesay were "administrative and not prosecutorial in function". *Ibid.*

The Court of Appeals offered no meaningful explanation for this finding The opinion merely provides a brief discussion of several of this Court's

decisions on the issue of the application of the absolute prosecutorial immunity; lists some of the circumstances that have been found in various cases to either be, or not be, subject to that immunity; and then states its summary conclusion that:

> "although the challenged conduct may . . . be 'to some degree related to trial preparation,' Van De Kamp and Livesay have failed to demonstrate the required 'close association . . . [with] the judicial phase of [Goldstein's] criminal trial,' [citation], or to clearly established prosecutorial functions such as deciding whether to prosecute a particular case. . . . The allegations against Van De Kamp and Livesay, which involve their failure to promulgate policies regarding the sharing of information relating to informants and their failure to adequately train and supervise deputy district attorneys on that subject, ***bear a close connection only to how the District Attorney's Office was managed, not to whether or how to prosecute a particular case or even a particular category of cases.*** [Footnote omitted.] Consequently, the challenged conduct is not prosecutorial in function and does not warrant the protections of absolute immunity."

Id. at 1176; emphasis added.

But what is at issue here has little to do with "how the District Attorney's Office was managed" – at least in the day-to-day sense of managing any type of business office. The allegations made by the

respondent against the petitioners are simply not the functional equivalent of true administrative policies such as hiring procedures and compensation schedules. Rather, the sole purpose of enacting the sort of policy envisioned by this Court in *Giglio* is to ensure compliance with due process requirements as outlined in this Court's decision in *Brady*. As such, it involves a core prosecutorial function – the dissemination of exculpatory information to the defense. Despite that, the Court of Appeals held that what was at issue was "not prosecutorial in function" and thus "does not warrant the protections of absolute immunity."

If the development of a policy involving a core prosecutorial function, one required by an explicit decision of the highest court in the land, is not one that "warrant[s] the protections of absolute immunity", what would? The answer, of course, is virtually nothing.

The conclusion that necessarily must be drawn from the Ninth Circuit's opinion in this case is that supervising prosecutors will only be protected by the absolute prosecutorial immunity when they are personally involved in an individual prosecution. Indirect involvement – such as through enacting (or failing to enact) policies governing the manner in which cases are prosecuted by the office, or through the manner in which line prosecutors are trained and supervised – simply will never "warrant the protections of absolute immunity." As the petitioners will show in the remainder of this petition, such an

extreme restriction on the application of the absolute prosecutorial immunity is not consistent with the case law or with the policies underlying the immunity. The entire issue is the subject of a split of opinion among the various circuit and district courts across the county.

If the Ninth Circuit's view of this issue is allowed to prevail, it will encourage a flood of lawsuits, cases that until now were universally agreed to be barred by the absolute prosecutorial immunity. That is one of the main concerns that led to the recognition of the immunity, and thus is why this Court should grant certiorari in this case.

2. THIS COURT'S DECISIONS HAVE CLARIFIED WHEN THE ABSOLUTE PROSECUTORIAL IMMUNITY IS APPLICABLE

A. *Imbler v. Pachtman*

The seminal case on the issue of the absolute prosecutorial immunity is *Imbler v. Pachtman,* 424 U.S. 409 (1976), in which the plaintiff, whose state murder conviction had been set aside through a federal habeas corpus proceeding, attempted, under the provisions of 42 U.S.C. §1983, to sue the deputy district attorney who had prosecuted him. *Id.* at 410-415. This Court affirmed the decisions of the district and circuit courts that the prosecutor had absolute immunity from such a suit. *Id.* at 410, 416.

In its opinion, this Court observed that it had held in *Tenney v. Brandhove,* 341 U.S. 367 (1951)

that, in enacting section 1983, Congress had not intended to abrogate "those immunities which historically, and for reasons of public policy, had been accorded to various categories of officials." *Imbler, supra,* at 417-418. This Court, noting that prosecutors enjoy absolute immunity for certain of their actions under the common law, concluded that prosecutors were therefore entitled to "the same absolute immunity under §1983 that the prosecutor enjoys at common law." *Id.* at 427.

This Court explained that the considerations that underlie the common-law immunity of prosecutors "include concern that harassment by unfounded litigation would cause a deflection of the prosecutor's energies from his public duties, and the possibility that he would shade his decisions instead of exercising the independence of judgment required by his public trust." *Id.* at 423. This Court quoted with approval the observations of the California Court of Appeal on this issue.

> "'The office of public prosecutor is one which must be administered with courage and independence. Yet how can this be if the prosecutor is made subject to suit by those whom he accuses and fails to convict? To allow this would open the way for unlimited harassment and embarrassment of the most conscientious officials by those who would profit thereby. There would be involved in every case the possible consequences of a failure to obtain a conviction. There would always be a question of possible civil action in case the

> prosecutor saw fit to move dismissal of the case. . . . The apprehension of such consequences would tend toward great uneasiness and toward weakening the fearless and impartial policy which should characterize the administration of this office. The work of the prosecutor would thus be impeded and we would have moved away from the desired objective of stricter and fairer law enforcement.'"

Id. at 423-424, citing to *Pearson v. Reed*, 6 Cal.App.2d 277, 287, 44 P.2d 592, 597 (Cal. Ct. App. 1935).

In explaining why an absolute, rather than qualified, immunity was called for, this Court stated that:

> "If a prosecutor had only a qualified immunity, the threat of §1983 suits would undermine performance of his duties no less than would the threat of common-law suits for malicious prosecution. A prosecutor is duty bound to exercise his best judgment both in deciding which suits to bring and in conducting them in court. The public trust of the prosecutor's office would suffer if he were constrained in making every decision by the consequences in terms of his own potential liability in a suit for damages. Such suits could be expected with some frequency, for a defendant often will transform his resentment at being prosecuted into the ascription of improper and malicious actions to the State's advocate. [Citations.] Further, if the prosecutor could be made to answer in court

> each time such a person charged him with wrongdoing, his energy and attention would be diverted from the pressing duty of enforcing the criminal law."

Imbler, supra, at 424-425.

This Court then "delineate[d] the boundaries" of its holding. *Id.* at 430.

> "We agree with the Court of Appeals that respondent's activities were intimately associated with the judicial phase of the criminal process, and thus were functions to which the reasons for absolute immunity apply with full force. We have no occasion to consider whether like or similar reasons require immunity for those aspects of the prosecutor's responsibility that cast him in the role of an administrator or investigative officer rather than that of advocate. We hold only that in initiating a prosecution and in presenting the State's case, the prosecutor is immune from a civil suit for damages under §1983."

Id. at 430-431; footnotes omitted.

This Court did observe that "the duties of the prosecutor in his role as advocate for the State involve actions preliminary to the initiation of a prosecution and actions apart from the courtroom." *Id.* at 431 n.33. This Court further explained that "[a]t some point, and with respect to some decisions, the prosecutor no doubt functions as an administrator rather than as an officer of the court. Drawing a

proper line between these functions may present difficult questions, but this case does not require us to anticipate them." *Ibid.*

B. Subsequent Case Law Has Further Explained The Nature And Scope Of The Absolute Prosecutorial Immunity Recognized In *Imbler*

In *Burns v. Reed,* 500 U.S. 478, 481 (1991), this Court addressed the question of "whether a state prosecuting attorney is absolutely immune from liability for damages under 42 U.S.C. §1983 for giving legal advice to the police and for participating in a probable-cause hearing." This Court found that "appearing at a probable-cause hearing is 'intimately associated with the judicial phase of the criminal process'" and thus subject to the absolute prosecutorial immunity. *Id.* at 492, quoting from *Imbler, supra,* at 430. This Court took the opposite view regarding a prosecutor giving legal advice to the police, even though the giving of such legal advice may be "related to a prosecutor's roles in screening cases for prosecution and in safeguarding the fairness of the criminal judicial process." *Id.* at 495.

> "Almost any action by a prosecutor, including his or her direct participation in purely investigative activity, could be said to be in some way related to the ultimate decision whether to prosecute, but we have never indicated that absolute immunity is that expansive. Rather, as in *Imbler,* we inquire

> whether the prosecutor's actions are closely associated with the judicial process."

Ibid.

In *Buckley v. Fitzsimmons*, 509 U.S. 259, 261 (1993), this Court concluded that prosecutors could not claim the protection of the absolute prosecutorial immunity in response to allegations of "fabricating evidence during the preliminary investigation of a crime and making false statements at a press conference announcing the return of an indictment."

> "In determining whether particular actions of government officials fit within a common-law tradition of absolute immunity, or only the more general standard of qualified immunity, we have applied a 'functional approach,' [citation], which looks to 'the nature of the function performed, not the identity of the actor who performed it,' [citation]."

Id. at 269.

This Court explained that while:

> "[a] prosecutor's administrative duties and those investigatory functions that do not relate to an advocate's preparation for the initiation of a prosecution or for judicial proceedings are not entitled to absolute immunity . . . acts undertaken by a prosecutor in preparing for the initiation of judicial proceedings or for trial, and which occur in the course of his role as an advocate for the State, ***are*** entitled to the protections of absolute immunity."

Id. at 273; emphasis added.

Specifically, this Court held that where a prosecutor "performs the investigative functions normally performed by a detective or police officer," he or she is not entitled to absolute immunity for those actions. *Ibid.* Similarly, "[t]he conduct of a press conference does not involve the initiation of a prosecution, the presentation of the State's case in court, or actions preparatory for these functions", and thus is not an act subject to the absolute immunity. *Id.* at 278.

In *Kalina v. Fletcher,* 522 U.S. 118, 120 (1997), this Court held that a prosecutor could not claim the protection of the absolute prosecutorial immunity in response to a lawsuit alleging that she made "false statements of fact in an affidavit supporting an application for an arrest warrant". In reaching that conclusion, this Court explained that:

> "the absolute immunity that protects the prosecutor's role as an advocate is not grounded in any special esteem for those who perform these functions, and certainly not from a desire to shield abuses of office, but because any lesser degree of immunity could impair the judicial process itself. Thus, in determining immunity, we examine the nature of the function performed, not the identity of the actor who performed it."

Id. at 127; citations and internal quotation marks omitted.

In *Kalina*, the petitioner had commenced a criminal proceeding against the respondent by filing three documents in the Superior Court. *Id.* at 120-121.

> "[P]etitioner's activities in connection with the preparation and filing of two of the three charging documents – the information and the motion for an arrest warrant – are protected by absolute immunity. Indeed, except for her act in personally attesting to the truth of the averments in the certification, it seems equally clear that the preparation and filing of the third document in the package was part of the advocate's function as well. The critical question, however, is whether she was acting as a complaining witness rather than a lawyer when she executed the certification 'under penalty of perjury.'"

Id. at 129.

The petitioner argued that "the execution of the certificate was just one incident in a presentation that, viewed as a whole, was the work of an advocate and was integral to the initiation of the prosecution." *Id.* at 130.

> "That characterization is appropriate for her drafting of the certification, her determination that the evidence was sufficiently strong to justify a probable-cause finding, her decision to file charges, and her presentation of the information and the motion to the court. Each of those matters involved the exercise of professional judgment; indeed, even the

> selection of the particular facts to include in the certification to provide the evidentiary support for the finding of probable cause required the exercise of the judgment of the advocate. But that judgment could not affect the truth or falsity of the factual statements themselves. Testifying about facts is the function of the witness, not of the lawyer. No matter how brief or succinct it may be, the evidentiary component of an application for an arrest warrant is a distinct and essential predicate for a finding of probable cause. Even when the person who makes the constitutionally required 'Oath or affirmation' is a lawyer, the only function that she performs in giving sworn testimony is that of a witness."

Id. at 130-131.

What can be gleaned from these cases is that the determination whether actions by a prosecutor are protected by the absolute prosecutorial immunity depends on whether those actions are "intimately associated with the judicial phase of the criminal process", *Imbler, supra,* at 430, rather than simply being in "some way related to the ultimate decision whether to prosecute". *Burns, supra,* at 495. Reviewing courts must "apply a 'functional approach,' which looks to 'the nature of the function performed, not the identity of the actor who performed it'." *Buckley, supra,* at 269; citations omitted.

Thus, "acts undertaken by a prosecutor in preparing for the initiation of judicial proceedings or for

trial, and which occur in the course of his [or her] role as an advocate for the State, are entitled to the protections of absolute immunity", while "administrative duties and those investigatory functions that do not relate to an advocate's preparation for the initiation of a prosecution or for judicial proceedings are not entitled to absolute immunity". *Id.* at 273.

In the present case, the Court of Appeals concluded that the actions of these petitioners were not "relate[d] to an advocate's preparation for the initiation of a prosecution or for judicial proceedings". While there are circuit and district court cases that would appear to support the Ninth Circuit's conclusion, there are just as many courts whose decisions indicate that they would come to the opposite conclusion. This split can only be resolved by this Court.

3. THE FEDERAL COURTS ARE SPLIT ON THE EXTENT TO WHICH SUPERVISING PROSECUTORS CAN CLAIM THE PROTECTION OF THE ABSOLUTE PROSECUTORIAL IMMUNITY

At issue in this action, as described by the Court of Appeals, is the petitioners' alleged "failure to promulgate policies regarding the sharing of information relating to informants and their failure to adequately train and supervise deputy district attorneys on that subject". *Goldstein, supra,* at 1176. The court found that those actions "bear a close connection only to how the District Attorney's Office was managed,

not to whether or how to prosecute a particular case or even a particular category of cases[, and therefore] the challenged conduct is not prosecutorial in function and does not warrant the protections of absolute immunity." *Ibid.*

The court did not explain how it came to this conclusion, merely asserting that, "although the challenged conduct may . . . be 'to some degree related to trial preparation,' Van De Kamp and Livesay have failed to demonstrate the required 'close association . . . [with] the judicial phase of [Goldstein's] criminal trial,' [citation], or to clearly established prosecutorial functions such as deciding whether to prosecute a particular case." *Ibid.*

In reaching this conclusion the court did not rely on any factually similar precedents, and acknowledged that "[n]either the Supreme Court nor this Court has considered whether claims regarding failure to train, failure to supervise, or failure to develop an office-wide policy regarding a constitutional obligation, like the one set forth in *Giglio,* are subject to absolute immunity." *Id.* at 1174. The court did mention in a footnote decisions from "the Courts of Appeals for the Second and Third Circuits [which] reached similar conclusions". *Id.* at 1175 n.2. And indeed these are not the only opinions which are supportive of the decision reached by the Ninth Circuit here. But there are also a number of cases that are in conflict with the decision reached in this appeal.

On the issue of whether supervisory personnel in a prosecutor's office can invoke the absolute prosecutorial immunity in regard to their setting of general prosecutorial policies, the D.C. Circuit and a judge in the District of Massachusetts have held that they can. *Haynesworth v. Miller,* 820 F.2d 1245, 1271 (D.C. Cir. 1987); *Jones v. City of Boston,* 2004 U.S. Dist. LEXIS 12628, *11 (D. Mass. 2004) (affirmed on appeal as *Jones v. City of Boston,* 135 Fed.Appx. 439, 440 (1st Cir. 2005) without reaching the immunity issue). The Ninth Circuit (in the present case) and a judge in the Eastern District of New York, *Sheff v. City of New York,* 2004 U.S. Dist. LEXIS 4819, *20-*21 (EDNY 2004), have taken the opposite position.

On the issue of whether supervisory personnel in a prosecutor's office can invoke the absolute prosecutorial immunity in response to allegations of a failure to train and/or supervise, the Seventh Circuit and judges in the District of Louisiana and the Eastern District of New York (as well as the Ninth Circuit in an unpublished decision that predates the present case) have held that they can. *Hamilton v. Daley,* 777 F.2d 1207, 1213 n.5 (7th Cir. 1985); *Truvia v. Julien,* 2005 U.S. Dist. LEXIS 539, *4-*5 (D. La. 2005); *Eisenberg v. District Attorney,* 1994 U.S. Dist. LEXIS 21535, *6 (EDNY 1994); *Modahl v. County of Kern,* 61 Fed.Appx. 394, 397 (9th Cir. 2003). The Second and Third Circuits, as well as judges in the Northern District of Illinois, the District of Louisiana, the Eastern District of New York, and the District of Oregon (and the Ninth Circuit in the present case)

have held that they cannot. *Walker v. New York,* 974 F.2d 293, 300 (2d Cir. 1992); *Carter v. City of Philadelphia,* 181 F.3d 339, 353 (3d Cir. 1999); *Baloun v. Williams,* 2002 U.S. Dist. LEXIS 20663, *30-*31 (N.D. Ill. 2002); *Thompson v. Connick,* 2005 U.S. Dist. LEXIS 36499, *12-*13 (D. La. 2005); *Sheff, supra; Kleinman v. Multnomah County,* 2004 U.S. Dist. LEXIS 21466, *19 (D. Or. 2004); *Goldstein, supra.*

In addition to the split of authority described above, the First Circuit and the Ninth Circuit have issued opinions allowing prosecutors to invoke the absolute prosecutorial immunity in situations that appear to be at least as "administrative" as the actions at issue in the present case. In both *Harrington v. Almy,* 977 F.2d 37 (1st Cir. 1992) and *Roe v. City & County of San Francisco, supra,* 109 F.3d 578 (9th Cir. 1997) what was at issue was a decision by a prosecutor's office to refuse to prosecute arrests made by a particular police officer. In both cases, the Courts of Appeals agreed that the absolute prosecutorial immunity could be invoked.

In *Ybarra v. Reno Thunderbird Mobile Home Village,* 723 F.2d 675, 676 (9th Cir. 1984), the plaintiff was arrested after a shooting in his mobile home. On the orders of a deputy district attorney, Malloy, the mobile home was secured and preserved as evidence. Before the plaintiff was released on bail, Malloy authorized the release of the mobile home. Thereafter the plaintiff sued, claiming that Malloy and others "had violated his rights by moving his mobile home or by allowing others to tamper with it and his possessions.

[Footnote.] He claimed damage to the home and a loss of possessions." *Id.* at 677. The Court of Appeals found that Malloy was entitled to absolute immunity, noting that "[i]n acting either to preserve or release evidence, the primary consideration, viewed objectively, is whether the prosecutor needs the evidence to prosecute." *Id.* at 679.

Finally, judges in the Eastern District of New York and the Northern and Southern Districts of Texas have each held that where the actions of a line prosecutor are protected by the absolute immunity, then the supervising prosecuting attorneys are also covered by that immunity. *Pinaud v. County of Suffolk,* 798 F.Supp. 913, 918 (EDNY 1992); *Lomtevas v. Cardozo,* 2006 U.S. Dist. LEXIS 5820, *16-*17 (EDNY 2006); *Smith v. Francis,* 2001 U.S. Dist. LEXIS 13993, *12-*13 (N.D. Tex. 2001) (by the Magistrate Judge; recommendation adopted without change at *Smith v. Francis,* 2001 U.S. Dist. LEXIS 15169 (N.D. Tex. 2001)); *Wilson v. Barcella,* 2007 U.S. Dist. LEXIS 22934, *82-*84 (S.D. Tex. 2007).

There is thus a very substantial and significant split in the circuit and district courts regarding the extent to which supervising prosecutors are entitled to invoke the absolute prosecutorial immunity; specifically whether the supervisors' acts of setting general prosecutorial policies, and of training and supervising their subordinates, are prosecutorial in nature (and thus subject to the immunity) or administrative (and thus not subject to the immunity). Only

this Court can resolve this long-standing split in the lower courts.

4. THE PETITIONERS' ALLEGED ACTIONS AT ISSUE HERE ARE THE TYPE OF ACTIONS INTENDED TO BE PROTECTED BY THE ABSOLUTE PROSECUTORIAL IMMUNITY

As noted earlier, the Court of Appeals did not explain how it came to its conclusion that the alleged actions of the petitioners were administrative rather than prosecutorial, simply asserting that finding rather than actually offering an analysis of the issue. If the Court had conducted such an analysis, it would have had a much harder time reaching the conclusion it did.

What is ultimately at issue here is the due process obligation, recognized by this Court in *Giglio*, that information relating to promises and other benefits offered by prosecutors to witnesses must be revealed to the defense. In *Imbler* itself this Court recognized that a prosecutor's failure to provide such information to the defense – or to provide *Brady* information in general – is not actionable, because it is subject to the absolute prosecutorial immunity. See *Imbler, supra,* at 431 n.34, citing explicitly to both *Brady* and *Giglio*.

So there can be no doubt that compliance with *Giglio* is an action "intimately associated with the judicial phase of the criminal process". *Imbler, supra,* at 430. The obligation recognized by the Court in *Giglio* is one imposed explicitly, and exclusively, on

prosecutors, which is logical given that it is a due process requirement, and due process is, of course, the fundamental underpinning of the "***judicial*** phase of the criminal process".

Due process requires that *Giglio* information, like *Brady* information, be provided to the defendant in order to assist in the defendant's preparation for and conduct of his or her defense at trial. Thus, the requirement of *Giglio* that the prosecutor locate that information necessarily makes it an "act[] undertaken by a prosecutor in preparing for the initiation of judicial proceedings or for trial". *Burns, supra,* at 495. And since the obligation is one imposed solely on prosecutors – because they are the agents of the state that conduct the defendant's trial – the act of locating and then turning over *Giglio* information must be recognized as conduct "which occur[s] in the course of [the prosecutor's] role as an advocate for the State". *Ibid.* This is further confirmed by the fact that a failure to comply with the requirements of *Giglio* can negatively impact the prosecution itself, if the trial judge chooses to impose sanctions such as the suppression of the informant's testimony, or even the outright dismissal of the case.

If the actions of a line prosecutor in regard to compliance with *Giglio* in an individual prosecution are subject to the absolute prosecutorial immunity, isn't it logical to conclude that the obligation imposed by this Court on prosecutor's offices as a whole – and thus on their supervisory personnel, such as the petitioners here – which obligation was imposed

solely to aid in the discovery of *Giglio* information so that it can then be delivered to defendants, should also be held to be subject to the absolute prosecutorial immunity? Applying a "functional approach" to the question yields just that result.

The key is to recognize just what we are looking at when we look to "the nature of the function performed". *Buckley, supra,* at 269. The respondent and the Court of Appeals took a generalized view of this, describing "the nature of the function performed" as simply the promulgation of policies and the training and supervision of deputy district attorneys, *Goldstein, supra,* at 1176, ignoring the purpose for which the policy-making, training, and supervision was being done.

This Court has warned about the dangers of overgeneralization in connection with the related issue of qualified immunity. "[T]he right the official is alleged to have violated must have been clearly established in a more particularized, and hence more relevant, sense: . . . (As we explained in *Anderson,* the right allegedly violated must be defined at the appropriate level of specificity before a court can determine if it was clearly established)." *Saucier v. Katz,* 533 U.S. 194, 202 (2001), referencing *Anderson v. Creighton,* 483 U.S. 635 (1987); citations and internal quotation marks omitted.

The Court of Appeals, in its opinion in this case, committed the same error that this Court warned about in *Saucier*: failing to evaluate the issue before

it at an "appropriate level of specificity". What is at issue here is not simply the promulgation of policies and the training and supervision of deputy district attorneys in the abstract. Rather, what is at issue is the promulgation of a specific policy, as ordered by this Court, to ensure the dissemination of *Giglio* information to the line prosecutors who might need to pass that information on to defendants in individual prosecutions, and training and supervision specifically intended to ensure compliance with *Giglio*. This is the true "nature of the function[s to be] performed" here. When described in this way, how can these acts not be said to be actions "intimately associated with the judicial phase of the criminal process", acts which have to be undertaken by line and supervising prosecutors alike "in preparing for the initiation of judicial proceedings or for trial"? Accordingly, these actions should be held to be fully protected by the absolute prosecutorial immunity.

5. FAILURE TO IMMUNIZE THE ACTIONS AT ISSUE HERE WILL BRING ABOUT THE PROBLEMS THE ABSOLUTE PROSECUTORIAL IMMUNITY WAS INTENDED TO AVOID

If the conduct at issue in this action is not made subject to the absolute prosecutorial immunity, it will eviscerate the effectiveness of that immunity. If such immunity is routinely denied to supervising prosecutors, as the Court of Appeals' opinion seems to require, then plaintiffs will simply shift their focus from line prosecutors to their supervisors, because it is a

simple matter to claim that the line prosecutor's actions were the result of a policy put into place by those supervisors, or the supervisors' failure to put into place a policy, or a failure to train or supervise on the part of the line prosecutors' supervisors.

The lawsuits that potential plaintiffs currently don't bother to file against line prosecutors – because they know that those cases will be dismissed almost immediately pursuant to the absolute prosecutorial immunity – can now be profitably filed, by the simple expedient of naming the supervisors as defendants rather than the line prosecutors. And the change in defendants ultimately won't help the line prosecutor, who will become a key witness in the ensuing lawsuit, thus creating the very "entanglement in vexatious litigation . . . that have been the primary wellsprings of absolute immunities." *Mitchell, supra,* at 522. As this Court noted in *Imbler, supra,* at 424-425, without the absolute immunity "§1983 suits . . . could be expected with some frequency, for a defendant often will transform his resentment at being prosecuted into the ascription of improper and malicious actions to the State's advocate."

Justice Kennedy, in his concurring and dissenting opinion in *Buckley, supra,* perceived the sort of problems that can be caused by an overly restrictive interpretation of the scope of the absolute prosecutorial immunity.

> "There is a reason even more fundamental than that stated by the Court for rejecting Buckley's argument that *Imbler* applies only to the commencement of a prosecution and to in-court conduct. This formulation of absolute prosecutorial immunity would convert what is now a substantial degree of protection for prosecutors into little more than a pleading rule. Almost all decisions to initiate prosecution are preceded by substantial and necessary out-of-court conduct by the prosecutor in evaluating the evidence and preparing for its introduction, just as almost every action taken in the courtroom requires some measure of out-of-court preparation. Were preparatory actions unprotected by absolute immunity, a criminal defendant turned civil plaintiff could simply reframe a claim to attack the preparation instead of the absolutely immune actions themselves. [Citations.] Allowing the avoidance of absolute immunity through that pleading mechanism would undermine in large part the protections that we found necessary in *Imbler* and would discourage trial preparation by prosecutors."

Buckley, supra, at 283 (Kennedy, J., concurring and dissenting).

The problems identified by Justice Kennedy are the same problems that will be created if the Ninth Circuit's opinion is allowed to become the rule in regard to the ability of supervising prosecutors to invoke the protections of the absolute prosecutorial immunity. Just as those problems could not be accepted in the circumstances at issue in *Buckley*, they

should not be found to be acceptable in the circumstances presented by this case.

CONCLUSION

The decision of the Ninth Circuit has opened the door to a potential flood of lawsuits against supervisory personnel in public prosecutor's offices. Only this Court can decide whether that door should remain open. Accordingly, the petitioners urge this Court to grant this petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit.

DATED: December 19, 2007

Respectfully submitted,

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Curt Livesay

APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

THOMAS LEE GOLDSTEIN,

Plaintiff-Appellee,

v.

CITY OF LONG BEACH;
COUNTY OF LOS ANGELES;
JOHN HENRY MILLER;
WILLIAM COLLETE; LOGAN WREN;
and WILLIAM MACLYMAN,

Defendants,

and

JOHN VAN DE KAMP and
CURT LIVESAY,

Defendants-Appellants.

No. 06-55537

D.C. No.
CV 04-09692-AHM

OPINION

Appeal from the United States District Court
for the Central District of California
A. Howard Matz, District Judge, Presiding

Argued and Submitted
March 5, 2007 – Pasadena, California

Filed March 28, 2007

Before: Stephen Reinhardt and Robert R. Beezer, Circuit Judges, and Thelton E. Henderson,* District Judge.

Opinion by Judge Henderson

COUNSEL

Steven J. Renick, Manning & Marder, Kass, Ellrod, Ramirez LLP, Los Angeles, California, for the defendants-appellants.

Ronald O. Kaye, David S. McLane, Marilyn E. Bednarski, Kaye, McLane & Bednarski, LLP, Pasadena, California, for the plaintiff-appellee.

OPINION

HENDERSON, District Judge:

In this case, we are asked to determine whether an elected district attorney and his chief deputy are entitled to absolute immunity from suit based on allegations that they failed to develop policies and procedures, and failed to adequately train and supervise their subordinates, to fulfill their constitutional obligation of ensuring that information regarding jailhouse informants was shared among prosecutors in their office. *See Giglio v. United States*, 405 U.S. 150, 154 (1972). For the reasons discussed in this

* The Honorable Thelton E. Henderson, Senior United States District Judge for the Northern District of California, sitting by designation.

opinion, we hold that they are not, and we therefore affirm the opinion of the district court.

I. Background

After serving twenty-four years in prison, Plaintiff-Appellee Thomas Lee Goldstein was released on April 2, 2004, following this Court's affirmance of the district court's order granting Goldstein's petition for habeas relief. Goldstein has now filed a complaint seeking damages under 42 U.S.C. § 1983 based on his wrongful conviction for murder. Although he has sued several individuals and entities, including the City of Long Beach, the County of Los Angeles, and four officers of the Long Beach Police Department, only his claims against Defendants-Appellants John Van De Kamp and Curt Livesay are at issue in this appeal.[1] Van De Kamp was the Los Angeles County District Attorney at the time Goldstein was prosecuted and convicted, and Livesay was his chief deputy.

The claims relevant to this appeal stem from the testimony at Goldstein's 1980 criminal trial of Edward Floyd Fink, a jailhouse informant. Fink testified that Goldstein confessed the murder to him while both were being detained in the Long Beach City Jail.

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[1] A different panel of this Court affirmed the district court's denial of a motion to dismiss brought by the County of Los Angeles. *Goldstein v. City of Long Beach*, 2006 WL 3206148, Case No. 05-56243 (9th Cir. Nov. 6, 2006).

Goldstein alleges that this testimony was false, as was Fink's testimony that he was not receiving any benefits for testifying against Goldstein and had never received any benefits for assisting law enforcement in the past. Fink had, in fact, been acting as an informant for the Long Beach Police Department for several years and had received multiple reduced sentences in return. Although other deputy district attorneys in the Los Angeles County District Attorney's Office were aware of the benefits provided to Fink in exchange for his testimony against Goldstein, this critical impeachment evidence was never shared with the deputy district attorneys prosecuting Goldstein's case, allegedly because no system of sharing such information existed in the District Attorney's Office at the time and because deputy district attorneys were not adequately trained or supervised to share such information. As a result, evidence that could have been used to impeach Fink was not shared with Goldstein's defense counsel, in violation of *Brady v. Maryland,* 373 U.S. 83, 87 (1963).

Several years prior to Goldstein's arrest and conviction, the Supreme Court explained that prosecutors' offices have a constitutional obligation to establish "procedures and regulations . . . to insure communication of all relevant information on each case [including promises made to informants in exchange for testimony in that case] to every lawyer who deals with it." *Giglio,* 405 U.S. at 154. Thus, Goldstein alleges that Van De Kamp and Livesay are liable under § 1983 because, as administrators of the

Los Angeles County District Attorney's Office, they violated his constitutional rights by purposefully or with deliberate indifference failing to create a system that would satisfy this obligation. Goldstein further alleges that Van De Kamp and Livesay violated his constitutional rights by failing to adequately train and supervise deputy district attorneys to ensure that they shared information regarding jailhouse informants with their colleagues.

Van De Kamp and Livesay sought dismissal of the claims against them, under Federal Rule of Civil Procedure 12(b)(6), based on an assertion of absolute prosecutorial immunity. The district court denied their motion on March 8, 2006, finding that Van De Kamp and Livesay's alleged conduct was administrative rather than prosecutorial and, therefore, not entitled to the protections of absolute immunity. Van De Kamp and Livesay filed a timely notice of interlocutory appeal on April 5, 2006.

II. Jurisdiction and Standard of Review

Although we do not generally have jurisdiction over interlocutory appeals of denials of motions to dismiss, we do have jurisdiction over such appeals where the district court denied a claim of absolute immunity. *Mitchell v. Forsyth*, 472 U.S. 511, 525 (1985). Such denials are immediately appealable because "the essence of absolute immunity is its possessor's entitlement not to have to answer for his conduct in a civil damages action," an entitlement

that "is effectively lost if a case is erroneously permitted to go to trial." *Id.* at 525-26.

Whether a public official is entitled to absolute immunity is a question of law that is reviewed de novo. *Botello v. Gammick,* 413 F.3d 971, 975 (9th Cir. 2005), *cert. denied,* 126 S. Ct. 1419 (2006). Because this appeal stems from a ruling on a motion to dismiss for failure to state a claim, we assume all factual allegations in the complaint to be true. *Id.*

In addition, "[t]o decide whether absolute immunity applies, we assume without deciding that [Goldstein] has alleged a deprivation of a constitutional right under § 1983." *Genzler v. Longanbach,* 410 F.3d 630, 643-44 (9th Cir. 2005), *cert. denied,* 126 S. Ct. 737 (2005) (citing *Buckley v. Fitzsimmons,* 509 U.S. 259, 261 (1993)). Whether the alleged conduct is sufficient to state a claim for liability under § 1983 is therefore not before the Court at this time.

III. Discussion

Courts have recognized two types of immunity from suit under 42 U.S.C. § 1983: qualified immunity and absolute immunity. *Buckley v. Fitzsimmons,* 509 U.S. 259, 268 (1993). Only absolute immunity is at issue in this appeal, as Van De Kamp and Livesay failed to make an alternative argument in the district court that the claims against them should be dismissed based on qualified immunity.

As its name implies, absolute immunity is an absolute bar to liability. Qualified immunity, on the other hand, shields officials from suits for damages only when their alleged conduct either does not violate a constitutional right or violates a constitutional right that was not "clearly established," meaning that a reasonable person in the official's position would not have known "his conduct was unlawful in the situation he confronted." *Saucier v. Katz,* 533 U.S. 194, 201-02 (2001).

"The presumption is that qualified rather than absolute immunity is sufficient to protect government officials in the exercise of their duties." *Burns v. Reed,* 500 U.S. 478, 486-87 (1991). The official seeking absolute immunity therefore bears the burden of demonstrating that it is warranted, and the Supreme Court has been "quite sparing in its recognition of claims to absolute official immunity." *Forrester v. White,* 484 U.S. 219, 224 (1988).

A prosecutor is entitled to absolute immunity under § 1983 for conduct that is "intimately associated with the judicial phase of the criminal process," *Imbler v. Pachtman,* 424 U.S. 409, 430 (1976), and "occur[s] in the course of his [or her] role as an advocate for the State," *Buckley,* 509 U.S. at 273. However, conduct is not shielded by absolute immunity simply because it is performed by a prosecutor. *Id.* To the contrary, a prosecutor is entitled only to qualified immunity "if he or she is performing investigatory or administrative functions, or is essentially functioning as a police officer or detective." *Broam v. Bogan,* 320

F.3d 1023, 1028 (9th Cir. 2003) (citing *Buckley,* 509 U.S. at 273). Thus, when determining whether absolute immunity applies, courts must examine "the nature of the function performed, not the identity of the actor who performed it." *Forrester,* 484 U.S. at 229.

Applying this functional analysis, the Supreme Court has held that prosecutors are absolutely immune from § 1983 liability for decisions to initiate a particular prosecution, to present knowingly false testimony at trial, and to suppress exculpatory evidence. *Imbler,* 424 U.S. at 431 & n.34. Prosecutors also enjoy absolute immunity for decisions not to prosecute particular cases, *Roe v. City & County of San Francisco,* 109 F.3d 578, 583-84 (9th Cir. 1997), and for gathering evidence to present to the trier of fact, as opposed to gathering evidence to determine whether probable cause exists to arrest, *Broam,* 320 F.3d at 1033.

On the other hand, prosecutors do not have absolute immunity "for advising police officers during the investigative phase of a criminal case, performing acts which are generally considered functions of the police, acting prior to having probable cause to arrest, or making statements to the public concerning criminal proceedings." *Botello,* 413 F.3d at 976-77 (citing *Burns,* 500 U.S. at 493, and *Buckley,* 509 U.S. at 274-78). Nor do government officials have absolute immunity "for conduct involving termination, demotion and treatment of employees." *Id.* at 976 (citing *Forrester,* 484 U.S. at 228-30, and *Meek v. County of*

Riverside, 183 F.3d 962, 967 (9th Cir. 1999)). For example, we have held that absolute immunity does not apply to a District Attorney's decisions to demote or fail to promote a deputy attorney, to reassign the deputy to a different department, or to bar the deputy from prosecuting any future murder cases. *Ceballos v. Garcetti,* 361 F.3d 1168, 1184 (9th Cir. 2004), *rev'd on other grounds,* 126 S. Ct. 1951 (2006). Unlike the removal of a deputy attorney from a particular case, which falls "within the District Attorney's prosecutorial function" because it is "intimately associated with the judicial phase of the criminal process," we determined that these challenged actions were "personnel decisions" falling "squarely within the District Attorney's administrative function. Even the decision not to reassign Ceballos to future murder cases was a personnel decision, and was unrelated to any particular prosecution or ongoing judicial proceeding." *Id.* (citing *Broam,* 320 F.3d at 1028).

Neither the Supreme Court nor this Court has considered whether claims regarding failure to train, failure to supervise, or failure to develop an office-wide policy regarding a constitutional obligation, like the one set forth in *Giglio,* are subject to absolute immunity. The closest we have come was in *Ybarra v. Reno Thunderbird Mobile Home Village,* 723 F.2d 675 (9th Cir. 1984), a case involving allegations that a supervising district attorney was "liable under § 1983 for failure to train his subordinate . . . to preserve exculpatory evidence, or in the alternative, for permitting a policy of not preserving exculpatory

evidence to exist in the District Attorney's Office." *Id.* at 680. We held that the district attorney would enjoy absolute prosecutorial immunity for any allegations based on his direct involvement in the plaintiff's case. *Id.* However, we did not reach the question of whether absolute immunity would similarly protect the district attorney on the supervisory claim or on the claim that he failed to develop an appropriate policy because we concluded that the evidence "fail[ed] to give rise to any inference" that the district attorney did not adequately train or supervise his subordinates, or that he failed to develop an appropriate policy of preserving evidence. *Id.* at 680-81.

We also considered supervisory liability of a district attorney in *Genzler,* 410 F.3d 630. In that case, we held that, like prosecuting attorneys with direct responsibility for a case, supervisory defendants are entitled to absolute immunity for "conduct closely related to prosecutorial decisions in the trial phase of [the plaintiff's] case," such as a claim "that the supervisory defendants knew that [the prosecuting attorney] had granted [a witness] immunity in exchange for perjured testimony favorable to the prosecution," or a claim "that the supervisory defendants were aware of and condoned a ploy to use [a witness's] perjured testimony to force the recusal of [the plaintiff's] counsel of choice." *Id.* at 644.

However, unlike the plaintiff in *Genzler,* Goldstein does not contend that Van De Kamp and Livesay are liable because they knew about, condoned, or directed any specific trial decisions made by the

deputy district attorneys prosecuting Goldstein's criminal case. Goldstein does not, for instance, assert that Van De Kamp and Livesay knew that Fink had been granted immunity for perjured testimony in Goldstein's particular case, or that they condoned withholding such information from Goldstein's criminal defense attorney. Instead, Goldstein rests his theory of liability on Van De Kamp and Livesay's alleged failure to develop a policy of sharing information regarding jailhouse informants within the District Attorney's Office and on their alleged failure to provide adequate training and supervision on this issue.

Van De Kamp and Livesay are correct that our holding in *Roe,* 109 F.3d 578, establishes that absolute immunity protects not only decisions made during an individual prosecution but may also apply to a policy decision. However, they reach too broadly in urging us to apply *Roe* to this case. *Roe* concerned challenges to a policy not to prosecute cases without corroborating evidence where a particular police officer was the sole witness to the alleged offense. *Id.* at 582. We held that a decision not to prosecute was intimately associated with the judicial phase of the criminal process and, therefore, entitled to absolute immunity, and we agreed with the Court of Appeals for the District of Columbia Circuit that "there is 'no meaningful distinction between a decision on prosecution in a single instance and decisions on prosecutions formulated as a policy for general application.'"

Id. at 583 (quoting *Haynesworth v. Miller,* 820 F.2d 1245, 1269 (D.C. Cir. 1987)).

The determinative factor in *Roe* was that the challenged policy involved the discretionary decision of whether Roe was a credible enough witness so that prosecutors could "prosecute his cases without corroborating evidence in good conscience or with a reasonable expectation of winning a conviction. . . . This kind of witness evaluation falls entirely within a prosecutor's judicial function regardless of whether one case or a line of cases is at issue." *Id.* at 584. Similarly, the challenged policy in *Haynesworth* also related to an alleged policy regarding which cases to prosecute: "Appellants aver that they were victimized by a policy of retaliatory prosecution – a practice of pursuing criminal charges against individuals who have endured wrongful arrests, solely because they refuse to waive civil suits against the arresting officers." *Haynesworth,* 820 F.2d at 1247. Thus, while *Roe* and *Haynesworth* demonstrate that a policy decision *may* be protected by absolute immunity, the critical factor remains the nature of the challenged policy and whether it falls "within a prosecutor's judicial function" or, instead, is part of a prosecutor's exercise of administrative or investigative functions. *Roe,* 109 F.3d at 584.

In this case, Van De Kamp and Livesay contend that the challenged conduct was prosecutorial in function even if it may have been administrative in form. We disagree. In the context of determining whether absolute immunity applies, "prosecutorial"

refers only to conduct that is "intimately associated with the judicial phase of the criminal process." *Imbler,* 424 U.S. at 430. Thus, an act is not "prosecutorial" simply because it has some connection with the judicial process or may have some impact at the trial level. Were that the rule, then prosecutors would be absolutely immune from any suit because all actions taken by prosecutors arguably have some connection to the judicial process – even those, such as personnel decisions, that we have explicitly held fall outside the protections of absolute immunity. *E.g., Ceballos,* 361 F.3d at 1184. As the Supreme Court has cautioned, "[a]lmost any action by a prosecutor, including his or her direct participation in a purely investigative activity, could be said to be in some way related to the ultimate decision whether to prosecute, but we have never indicated that absolute immunity is that expansive." *Burns,* 500 U.S. at 495.

While it may be possible for an act to be prosecutorial in function but administrative in form, we need not decide whether such conduct would be entitled to absolute immunity because we conclude that Goldstein's allegations are administrative and not prosecutorial in function.[2] Van De Kamp and Livesay

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[2] We note that the Courts of Appeals for the Second and Third Circuits reached similar conclusions, albeit in a different context, in *Walker v. City of New York,* 974 F.2d 293 (2d Cir. 1992) and *Carter v. City of Philadelphia,* 181 F.3d 339 (3d Cir. 1999). Both cases involved challenges to a municipality's liability, which in turn involved questions of whether the alleged conduct was prosecutorial or administrative in function. The

(Continued on following page)

correctly argue that the specific duty to share information regarding jailhouse informants arose only because of their roles as prosecutors. However, although the challenged conduct may thus be "to some degree related to trial preparation," Van De Kamp and Livesay have failed to demonstrate the required "close association . . . [with] the judicial phase of [Goldstein's] criminal trial," *Genzler*, 410 F.3d at 643, or to clearly established prosecutorial functions such as deciding whether to prosecute a particular case. *See also Burns*, 500 U.S. at 495 (requiring courts to "inquire whether the prosecutor's actions are closely associated with the judicial process"); *Imbler*, 424 U.S. at 430 (requiring that the conduct be "intimately associated with the judicial phase of the criminal process"). Administrative work cannot be "retroactively transform[ed]" into the prosecutorial simply because "the evidence this work produced" might affect whether a prosecutor decides to bring a case or, if a case is brought, how the evidence is presented at

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Second Circuit held that allegations regarding a "decision not to supervise or train [assistant district attorneys] on *Brady* and perjury issues" raised challenges to the district attorney's "acts as the manager of the district attorney's office" rather than to the district attorney's actions "'in a quasi-judicial capacity.'" *Walker*, 974 F.2d at 301 (quoting *Baez v. Hennessy*, 853 F.2d 73, 77 (2d Cir. 1988)). Similarly, the Third Circuit held that "policies relating to training, supervision and discipline" involved "not prosecutorial, but administrative" functions. *Carter*, 181 F.3d at 353; *see also id.* at 355-56 (declining to apply absolute prosecutorial immunity because the challenged conduct was "administrative, rather than prosecutorial").

trial. *Buckley,* 509 U.S. at 275-76. The allegations against Van De Kamp and Livesay, which involve their failure to promulgate policies regarding the sharing of information relating to informants and their failure to adequately train and supervise deputy district attorneys on that subject, bear a close connection only to how the District Attorney's Office was managed, not to whether or how to prosecute a particular case or even a particular category of cases.[3] Consequently, the challenged conduct is not prosecutorial in function and does not warrant the protections of absolute immunity.

IV. Conclusion

For the above reasons, we hold that the district court correctly determined that Goldstein's allegations against Van De Kamp and Livesay describe conduct in furtherance of an administrative rather than prosecutorial function. Van De Kamp and Livesay have therefore failed to meet their burden of demonstrating that the allegations against them are so "intimately associated with the judicial phase of the criminal process" that absolute immunity is warranted. *Imbler,* 424 U.S. at 430. Accordingly, the decision of the district court is **AFFIRMED**.

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[3] Thus, we need not and do not decide whether a policy decision regarding how to prosecute a particular category of cases would be protected by absolute immunity.

APPENDIX B

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Case No. CV 04-9692AHM (Ex) Date March 6, 2006

Title GOLDSTEIN V. CITY OF LONG BEACH, *et al.*

Present: The Honorable A. Howard Matz

Stephen Montes	N/A	
Deputy Clerk	Court Reporter/Recorder	Tape No.

Attorneys Present for Plaintiffs:	Attorneys Present for Defendants:
No Appearance	No Appearance

Proceedings: In Chambers

I. INTRODUCTION

Defendants John Van de Kamp and Curt Livesay[1] move under Federal Rule of Civil Procedure 12(b)(6) to dismiss Plaintiff Thomas Goldstein's Fifth Claim for Relief in his Second Amended Complaint ("SAC"). Van De Kamp was the District Attorney for the County of Los Angeles ("the County") at the time

[1] Although other defendants are in this case, for the purposes of this minute order, "Defendants" shall mean only Van De Kamp and Livesay.

Goldstein was prosecuted and convicted; Livesay was Van De Kamp's chief deputy.

Goldstein's Fifth Claim for Relief alleges that Van De Kamp and Livesay, acting

> as the administrators and policymakers of the Los Angeles County District Attorney's Office[,] . . . maintained, enforced, tolerated, permitted, acquiesced in, and ratified the administrative policy, practice and custom of failing to disseminate impeachment information, including the benefits jailhouse informants received in exchange for assistance in securing convictions against criminal defendants . . . [and] failed to create a system and failed to train Deputy District Attorneys who handled jailhouse informants, to provide [other] Deputy District Attorneys . . . with information with regard to jailhouse informants. . . . [Moreover, Van De Kamp and Livesay], as the administrators and policymakers of the Los Angeles County District Attorney's Office[,] . . . failed to install such a system and failed to train Deputy District Attorneys to disseminate impeachment information. . . .

SAC ¶¶ 152, 154. In Plaintiff's own words, the "core of Mr. Goldstein's claim [against Van De Kamp and Livesay] is [that] they failed to take the necessary administrative steps to prevent these sorts of constitutional violations from occurring. . . ." Opp'n at 4; *see* SAC ¶¶ 88-94, 151-155.

II. ANALYSIS

A. Legal Standard on Motions to Dismiss

On a motion to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure for failure to state a claim, the allegations of the complaint must be accepted as true and are to be construed in the light most favorable to the nonmoving party. *Wyler Summit P'ship v. Turner Broad. Sys., Inc.*, 135 F.3d 658, 661 (9th Cir. 1998). A Rule 12(b)(6) motion tests the legal sufficiency of the claims asserted in the complaint. Dismissal is proper only where "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *Moore v. City of Costa Mesa*, 886 F.2d 260, 262 (9th Cir. 1989) (employing *Conley v. Gibson* standard).

B. The Challenged Conduct Is "Administrative" In Nature

Van De Kamp and Livesay argue that they are absolutely immune under *Imbler v. Pachtman*, 424 U.S. 409 (1976), because the conduct challenged by Goldstein is "intimately associated with the judicial phase of the criminal process." *Id.* at 430. That is, they contend that their actions relating to the alleged office-wide policy of failing to disseminate impeachment information regarding jailhouse informants is "prosecutorial," not "administrative" or "investigative," in nature.

Although "the line between 'administrative' or 'investigative' acts and 'quasi-judicial' [*i.e.*, 'prosecutorial'] acts is not always a clear one," *Demery v. Kupperman*, 735 F.2d 1139, 1143 (9th Cir. 1984), the Court has already considered this very issue on the County's earlier motion to dismiss. That motion concerned principles of Eleventh Amendment immunity regarding the County's potential liability for the conduct now attributed to Van De Kamp and Livesay directly. Following *Ceballos v. Garcetti*, 361 F.3d 1168 (9th Cir. 2004), the Court found that the County's liability turned on whether the District Attorney would enjoy absolute immunity, and specifically, whether the District Attorney's implementation of or acquiescence to a policy designed to prevent the flow of impeachment information to the Deputy District Attorneys trying cases should be considered "prosecutorial" or "administrative" in nature. The Court, in denying the County's motion to dismiss, held that the challenged "policies and practices . . . are not only alleged to be 'administrative,' but they clearly *are* administrative." Order Granting and Denying [the County's] Motion to Dismiss, July 27, 2005 (emphasis in original). The County appealed, and that appeal is still pending at the Ninth Circuit.

Thus, Van De Kamp and Livesay's present motion and the County's earlier motion raise, at least in part, the very same issue: whether the alleged conduct of the District Attorney (*i.e.*, of Van De Kamp and of Livesay) is "prosecutorial" or "administrative" in nature. The Court already answered that question

in relation to the County's claim of immunity under the Eleventh Amendment, concluding that such conduct is "administrative." In reaching that conclusion, the Court considered the very cases that each party now contends supports its own position or undermines that of its adversary. Indeed, Defendants' motion papers and Goldstein's opposition papers cite to no cases decided *after* the Court's July 27, 2005 denial of the County's earlier motion to dismiss.[2]

Furthermore, that denial is now on appeal. It is likely that Ninth Circuit will have to consider the line between "prosecutorial" and "administrative" conduct. Accordingly, dismissing Van De Kamp and Livesay from the case seems premature at this point.

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[2] On this motion, Defendants place additional emphasis on – indeed, greatly rely on – *Roe v. City and County of San Francisco*, 109 F.3d 578 (9th Cir 1997). Defendants argue that *Roe* establishes that prosecutors' decisions not to prosecute any case, or all cases, investigated by a given police officer are "prosecutive," not administrative, even though they involve multiple cases, not just an individual case. From that characterization, Defendants conclude that their alleged misconduct, claimed to be systemic, is therefore "prosecutive." Not so; Defendants have missed the point of *Roe*. The reason that the Ninth Circuit upheld the dismissal of that case on grounds of absolute immunity was that the whole issue, the sole conduct, of defendants was about whether to *prosecute*. Here, in contrast, the SAC alleges a host of practices and policies concerning personnel administration, supervision, and methods of investigation.

III. CONCLUSION

For the foregoing reasons, Defendants' motion to dismiss is DENIED.[3] This Order is not intended for publication.

_____:_____

Initials of Preparer /s/ [Illegible]

[3] Docket No. 79.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

THOMAS LEE GOLDSTEIN, Plaintiff-Appellee, v. CITY OF LONG BEACH; COUNTY OF LOS ANGELES; JOHN HENRY MILLER; WILLIAM COLLETTE; LOGAN WREN; WILLIAM MACLYMAN, Defendants, and JOHN VAN DE KAMP; CURT LIVESAY, Defendants-Appellants.	No. 06-55537 D.C. No. CV-04-09692-AHM Central District of California, Los Angeles ORDER (Filed Sep. 20, 2007)

Before: BEEZER and REINHARDT, Circuit Judges, and HENDERSON,* Sen. District Judge.

The panel has voted to deny the petition for rehearing.

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* The Honorable Thelton E. Henderson, Senior United States District Judge for the Northern District of California, sitting by designation.

A judge requested a vote on whether to rehear this matter en banc. The matter failed to receive a majority of the votes of the nonrecused active judges in favor of en banc consideration.** Fed. R. App. P. 35. The request for rehearing en banc is denied.

** The Honorable Kim McLane Wardlaw is recused.

OPPOSITION BRIEF

87

No. 07-854

FILED
MAR 3 - 2008
OFFICE OF THE CLERK
SUPREME COURT

In The

Supreme Court of the United States

JOHN VAN DE KAMP and CURT LIVESAY,
Petitioners,

v.

THOMAS LEE GOLDSTEIN,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

1. Whether there are compelling reasons to grant review where the lower court's decision not to extend the extraordinary protection of absolute prosecutorial immunity to purely administrative conduct - - the Petitioners' failure to establish and train staff concerning an internal information management system that would ensure internal access to information concerning informants as mandated by *Giglio v. United States*, 405 U.S. 150, 154 (1972) - - is in line with Supreme Court precedent, consistent with other circuit authority, and does not present an important federal question to be settled by this Court?

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SUMMARY OF ARGUMENT

Petitioners have presented no "compelling reasons" for granting *certiorari* in this case. *See* Sup. Ct. R. 10. In the case at bar, *Goldstein v. City of Long Beach*, 481 F.3d 1170 (9th Cir. 2007), the Ninth Circuit held that supervisors in the Los Angeles County District Attorney's Office are not absolutely immune from suit for their administrative failure to either create an information management system within their office regarding informants as required by the Supreme Court in *Giglio v. United States*, 405 U.S. 150, 154 (1972) or to adequately train their staff to maintain and access such a system.

The petition for *certiorari* should not be granted because it is based on a fundamentally flawed premise: the questions presented by Petitioners focus on whether supervisors can be held liable for improper policies and training on the *disclosure* of *Brady*, (*Brady v. Maryland*, 373 U.S. 83 (1963)), information. (Cert. Pet. at i.) The questions presented, the purported conflict in authority, and the perceived importance of the case, all stem from this flawed premise of Petitioners. Simply put, Petitioners' perceived theory of liability is not the theory of liability pled in Mr. Goldstein's Second Amended Complaint nor the theory of liability resolved by the Ninth Circuit below.

In his Second Amended Complaint, Mr. Goldstein alleged that Petitioners are liable to him because they failed to set up an internal information management system for informant witnesses *within* the District Attorney's Office - - as directed by *Giglio*, decided seven years before Mr. Goldstein's prosecution - - and

to train staff regarding the maintenance of such a system. This administrative failure set in motion a causal chain of events that, to be sure, led to the improper non-disclosure of critical impeachment information in Mr. Goldstein's case concerning the benefits received by the informant who testified against Mr. Goldstein. The line prosecutor did not have access to this information to disclose to Mr. Goldstein's defense attorney because there was no internal information management system of informant information that he could access. As a result, Mr. Goldstein suffered an injury, a wrongful conviction in 1980 that was overturned 23 years later in 2003. But the fact that a subsequent lack of disclosure forms a link in the causal chain leading to Mr. Goldstein's ultimate injury does not alter the administrative nature of the conduct for which Mr. Goldstein seeks to hold Petitioners liable. *See, e.g., Buckley v. Fitzsimmons*, 509 U.S. 259, 275-76 (1993).

When Mr. Goldstein's cause of action is properly characterized, it is obvious that *Goldstein* is a mainstream decision that does not merit review by this Court. The decision in *Goldstein* follows directly from the Supreme Court decisions in *Burns v. Reed*, 500 U.S. 478 (1991) and *Buckley v. Fitzsimmons*, 509 U.S. 259 (1993), relied on extensively in *Goldstein*, which instruct a court in evaluating whether a prosecutor's conduct is immune from civil suit to look at the *function* of the act that allegedly violated the plaintiff's rights, not the effects or harm caused by the act. Viewing the creation of an information management system concerning informants for what it is, not the effect or harm caused by the failure to create such a system, the District Court held in this case, the

"policies and practices . . . are not only alleged to be 'administrative', but they clearly are administrative." (App. B at 19.) Since the Ninth Circuit decision flows from Supreme Court precedent, there is not an important federal question to be settled by this Court. Sup. Ct. R. 10(a).

Nor is there a split in authority between the holding in *Goldstein* and any other cases, let alone circuit cases, that would warrant granting *certiorari*. *See* Sup. Ct. R. 10(a). Indeed, *Goldstein* is the only circuit decision in the country addressing the unavailability of absolute immunity to heads of prosecutors' offices when they fail to fulfill their administrative obligations under *Giglio*. In any event, *Goldstein* is in line with circuit decisions around the country which have limited the special protection of absolute immunity to prosecutorial functions and refused to expand it to purely administrative failures, which are still shielded by qualified immunity.

Lastly, the argument by Petitioners and their *Amici* that review of *Goldstein* must be granted, because heads of prosecutor's offices will be subjected to innumerable "vexatious" lawsuits by "disgruntled" defendants, does not withstand scrutiny. (Cert. Pet. at 33; L.A.D.A. *Amicus* Br. at 11.) As a legal and practical matter, the import of *Goldstein* is limited to its particular facts. *Goldstein* stands for the very limited proposition that absolute immunity does not extend to heads of prosecutor's offices when they are sued by plaintiffs who, like Mr. Goldstein, (1) are actually innocent, (2) have had their convictions overturned, and (3) can demonstrate that their wrongful convictions are causally connected to

supervisory prosecutors' purely administrative failure to set up an information management system as required by *Giglio* twenty-five years ago, which presumably most prosecutors' offices have done by now. Even if these demanding criteria are met, supervisory prosecutors may still be protected by qualified immunity, an issue yet to be litigated, as this case comes to this Court by way of interlocutory appeal. Indeed, qualified immunity is likely to afford supervisory prosecutors protection for their administrative failures, as there are unlikely to be many instances outside of the *Goldstein* context where clearly established law sets forth administrative obligations of supervisory prosecutors that are willfully violated by those prosecutors. *See Saucier v. Katz*, 533 U.S. 194 (2001).

Petitioners have failed to meet their burden of demonstrating any compelling reasons for this Court to grant the Petition. Accordingly, the Petition should be denied.

STATEMENT OF THE CASE

In 1980, Thomas Goldstein, a military veteran honorably discharged from the United States Marine Corps, who had no prior criminal convictions, was wrongfully convicted of murder on the basis of

fabricated evidence and perjured testimony. (SAC at ¶¶ 4, 21, 52, 53; ER at 14, 17, 24.)[1] Mr. Goldstein was innocent of the charges. (SAC at ¶ 4; ER at 14.)

Mr. Goldstein's conviction depended upon the testimony of a jailhouse informant, Edward Floyd Fink, who falsely testified that Mr. Goldstein confessed to him while both were detained in the Long Beach City Jail, in Long Beach, California. *Goldstein v. City of Long Beach*, 481 F.3d 1170, 1171 (9th Cir. 2007). Mr. Fink also falsely testified that he was not receiving any benefits for testifying against Mr. Goldstein and had never received any benefits for assisting law enforcement in the past. *Id.* "Fink had, in fact, been acting as an informant for the Long Beach Police Department for several years and had received multiple reduced sentences in return." *Id.* This information, although known to others in the Los Angeles County District Attorney's Office, was unknown to the individual prosecutor trying Mr. Goldstein, and consequently was never disclosed to counsel for Mr. Goldstein before or during trial. (SAC at ¶¶ 79, 80, 84; ER at 30, 32.)

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[1] "SAC" refers to the Second Amended Complaint; "ER" refers to the Excerpts of Record before the Ninth Circuit; "Cert. Pet." refers to the petition for *certiorari*; and "App. A", "App. B", and "App. C", refer to the Ninth Circuit decision, the district court opinion, and the denial of the petition for rehearing and rehearing *en banc* attached to the petition for *certiorari*. "L.A.D.A. *Amicus* Br." refers to the *amicus* brief filed by the Los Angeles County District Attorney's Office, and "C.D.A.A. *Amicus* Br." refers to the *amicus* brief filed by the California District Attorneys Association, National Association of District Attorneys, and other district attorney group *Amici*.

In 2004, Mr. Goldstein was released, after 24 years of wrongful imprisonment, pursuant to a petition for *habeas corpus* that was granted by the federal district court and affirmed by the Ninth Circuit. *Goldstein,* 481 F.3d at 1171. Shortly thereafter, Mr. Goldstein filed a civil rights lawsuit seeking damages under 42 U.S.C. § 1983 based on his wrongful conviction. *Id.*

Mr. Goldstein filed suit against Petitioners John Van De Kamp and Curt Livesay, seeking to hold them liable for their activities as administrators of the Los Angeles County District Attorney's Office, not for their prosecutorial activities. *Id.* at 1172. Petitioners were the chief administrators and policymakers for the Los Angeles County District Attorney's Office at the time of Mr. Goldstein's wrongful conviction. (SAC at ¶ 91; ER at 33-34.) They were not directly involved in Mr. Goldstein's prosecution. (*See* SAC at ¶¶ 86-106; ER at 31-38.)

The theory of Mr. Goldstein's suit was that the heads of large prosecutors' offices, like the Los Angeles County District Attorney's Office, the largest district attorney's office in the country (L.A.D.A. *Amicus* Br. at 2), have administrative obligations to create an information management system about informants and an obligation to train staff about maintaining this information management system. These obligations arise from the Supreme Court's ruling in *Giglio v. United States*, 405 U.S. 150 (1972), which was decided seven years prior to the prosecution of Mr. Goldstein in 1979-80. (SAC at ¶ 37; ER at 32, 33.) *Giglio* mandated that large prosecution offices create "procedures and regulations . . . to insure communication of all relevant information on each case

[including promises to informants] to every lawyer [in the office] who deals with it." *Id.* at 154. (SAC at ¶ 87; ER at 32, 33.)

Mr. Goldstein specifically alleged in his Second Amended Complaint that the actionable conduct by Petitioners Van De Kamp and Livesay as heads of the Los Angeles County District Attorney's Office was their failure to fulfill these Supreme Court mandated administrative obligations. (SAC at ¶¶ 92, 152-54; ER at 34, 50-52.)

Mr. Goldstein's allegations that Petitioners failed to perform their administrative obligations were supported by a report issued by the Los Angeles County Grand Jury, which found that the Los Angeles County District Attorney's Office had failed in its responsibilities by its "deliberate and informed declination to take the action necessary to curtail the misuse of jail house informant testimony." (SAC at ¶ 103; ER at 37.) Among the criticisms was the failure by the District Attorney's Office to institute a system to track informant benefits and testimony, despite awareness of ongoing problems with informant perjury since at least the late 1970s, prior to Mr. Goldstein's criminal prosecution. (SAC at ¶¶ 89-98; ER at 33-35.)

As alleged in the Second Amended Complaint, Petitioner's failure to institute a management database concerning informants set in motion a causal chain of events that resulted in his wrongful conviction. Specifically, in the absence of this information management system, the trial prosecutor was ignorant of the benefits that informant Fink received over the years - - including for his testimony

in Mr. Goldstein's own case - - and thus was unable to evaluate if information about these benefits should be disclosed to the defense pursuant to *Brady* and *Giglio*. 481 F. 3d at 1171-72. (SAC at ¶¶ 78, 79, 151-55; ER 30, 50-52.) Mr. Goldstein's right to due process and a fair trial were ultimately compromised.

In lieu of filing an answer to Mr. Goldstein's Second Amended Complaint, Petitioners sought to dismiss Mr. Goldstein's claims on the basis of absolute prosecutorial immunity. After the Central District of California rejected this argument, Petitioners sought an interlocutory appeal to the Ninth Circuit. A unanimous Ninth Circuit panel affirmed the District Court's ruling. 481 F. 3d at 1176. (App. B, District Court opinion, at 16-21.) The Ninth Circuit subsequently denied rehearing and rehearing *en banc* (App. C at 22-23), and Petitioners now seek to pursue this interlocutory appeal in this Court.

REASONS FOR DENYING THE PETITION

I. THE ENTIRE PETITION IS PREMISED ON A MISCONSTRUCTION OF THE SECOND AMENDED COMPLAINT AND THE *GOLDSTEIN* OPINION, AND WHEN PROPERLY CONSTRUED, THE *GOLDSTEIN* OPINION IS AN UNEXCEPTIONAL APPLICATION OF SUPREME COURT PRECEDENT

A. Construed Correctly, the Ninth Circuit Ruled that the Second Amended Complaint's Allegations that the Failure to Create an Information Management Database Concerning Informants Was an Administrative Function.

The Petitioners misconstrue Mr. Goldstein's Second Amended Complaint and the *Goldstein* opinion in an effort to convince the Court to grant review. Petitioners allege that the cause of action has something to do with setting up policies for disclosure to criminal defendants of *Brady* information and training deputies on disclosure of *Brady* information to criminal defendants. (*See*, *e.g.*, Cert. Pet. at i, Question Presented, "may a plaintiff circumvent that immunity . . . with regard to the disclosure of such informant information"; Cert Pet. at i, Question Presented, "[a]re the decisions of a supervisory prosecutor . . . overseeing . . . individual prosecutor's compliance with *Brady* . . . and *Giglio* . . . in the course of preparing for the initiation of judicial proceedings or trial"; Cert. Pet. at 14, the policy at issue in this case "involves a core prosecutorial function - the

dissemination of exculpatory information to the defense"; Cert. Pet. at 32, "what is at issue is the promulgation of a specific policy, ordered by this Court, to ensure the dissemination . . . to line prosecutors who might need to pass that information on to defendants in individual prosecutions.")

This is incorrect. The Second Amended Complaint alleged that Petitioners failed to set up an internal information management system concerning informants and failed to train employees concerning that system,

> Defendant John Van De Kamp, Defendant Curt Livesay . . . in their role as administrators of the Los Angeles County District Attorney's Office, failed to create a system, failed to train and failed to supervise Deputy District Attorneys who handled jailhouse informants, to provide Deputy District Attorneys, including the Deputy District Attorneys who prosecuted Plaintiff, with information with regard to jailhouse informants, including the jailhouse informant who testified against Plaintiff, although required to do so by law. The impeachment information which the Defendant John Van De Kamp and Defendant Curt Livesay failed to instruct representatives of the Los Angeles County District Attorney's Office to disseminate throughout the office included the benefits the jailhouse informant was receiving for his cooperation against a criminal defendant, the jailhouse informant's history of cooperation with

> law enforcement, and other factors relating to the jailhouse informant's credibility . . . .

(SAC at ¶ 154; ER 39-40.)

The Ninth Circuit recognized that, "Goldstein rests his theory of liability on Van De Kamp and Livesay's alleged failure to develop a policy of sharing information regarding jailhouse informants *within* the District Attorney's Office and on their alleged failure to provide adequate training and supervision on this issue." *Goldstein*, 481 F.3d at 1174. (Emphasis added.)

It is critical to understand what was *not* alleged by Mr. Goldstein. Mr. Goldstein did not allege that anyone in the prosecutor's office *intentionally* suppressed exculpatory evidence in his case. Nor did he allege that Petitioners created a policy directing line district attorneys to suppress exculpatory evidence. Likewise, he did not allege that the Petitioners failed to provide adequate training and supervision to line district attorneys regarding their duties to disclose exculpatory evidence. In fact, he did not even allege that Petitioners established (or failed to establish) policies, supervision, or training that in any way governed how or whether deputy prosecutors carried out their duty to disclose exculpatory evidence to criminal defendants.

Instead, Mr. Goldstein alleged that Petitioners, responsible for the administration of the Los Angeles District Attorney's Office, failed to implement a data management system that would allow individuals within the District Attorney's Office - - be it line prosecutors, investigators, paralegals, or clerical staff -

- to share *with one another* information about the benefits informants had received in exchange for testifying, and informants' history of working with law enforcement. It was within the discretion of the line district attorney who worked on Mr. Goldstein's prosecution to decide which evidence should be turned over to Mr. Goldstein pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963) and which should not. This is not what is at issue here though. Unfortunately, the line district attorney in question never had the opportunity to exercise his prosecutorial discretion and make this decision because the Petitioners' administrative mismanagement deprived him of the necessary information, which was hidden away in the files of his colleagues. Ultimately, it is not a prosecutorial decision that is being challenged by Mr. Goldstein, it is an administrative decision that had the effect of eliminating prosecutorial decision-making by preventing individuals within the District Attorney's Office from effectively sharing information with each other.

It was this failure to create an information management system to share data on informants among employees in the prosecutor's office (and failure to train them to use this non-existent system) that the Ninth Circuit found to be un-immunized, administrative conduct: Petitioners' "failure to promulgate policies regarding the sharing of information relating to informants and their failure to adequately train and supervise deputy district attorneys on that subject, bear a close connection only to how the District Attorney's Office was managed, not to whether or how to prosecute a particular case or

even a particular category of cases." *Goldstein*, 481 F.3d at 1176.

B. Construed Correctly, the *Goldstein* Opinion Follows Settled Supreme Court Authority and thus Does Not Present an Important Question to be Decided by this Court.

The Ninth Circuit decision does not cut a wide swath into new territory, but rather applies established Supreme Court principles to the specific practices being challenged by Mr. Goldstein and concludes that these practices are administrative, not prosecutorial, and thus not entitled to absolute immunity. Accordingly, the case does not present an important question of federal law to be settled by this Court. As set forth in the *Goldstein* opinion,

> [a] prosecutor is entitled to absolute immunity under § 1983 for conduct that is "intimately associated with the judicial phase of the criminal process," *Imbler v. Pachtman*, 424 U.S. 409, 430 [citation omitted] (1976), and "occur[s] in the course of his [or her] role as an advocate for the State," *Buckley*, [citation omitted]. However, conduct is not shielded by absolute immunity simply because it is performed by a prosecutor. *Id.* To the contrary, a prosecutor is entitled only to qualified immunity "if he or she is performing investigatory or administrative functions . . . . [citations omitted]."

Goldstein, 481 F.3d at 1173.

The Ninth Circuit's decision in this case follows directly from this Court's holdings in *Burns v. Reed*, 500 U.S. 478 (1991) and *Buckley v. Fitzsimmons*, 509 U.S. 259 (1993), and directly relied on these Supreme Court precedents. *See Goldstein*, 481 F.3d at 1175-76.

In *Burns*, this Court held that a prosecutor was absolutely immune for his conduct while appearing before a court in a probable cause hearing, where the prosecutor presented evidence of a confession without informing the judge that this "confession" had been made under hypnosis. *Burns*, 500 U.S. at 491-92. Nonetheless, the prosecutor was held *not to be immune* for having advised the police that it was legally acceptable to hypnotize a criminal suspect to obtain this confession and then use this confession as a basis for arresting the suspect and establishing probable cause for a search warrant. *Id.* at 496. As with the instant case, where Petitioners' action led to an unfair trial that resulted in Mr. Goldstein being unjustly imprisoned, the harm that formed the basis of the claim in *Burns* occurred during an immunized proceeding - - a probable cause hearing. However, this Court clearly held that this fact did not immunize the conduct that had led to this harm (*i.e.*, giving improper legal advice to the police). *Id.* So too, the fact that the harm to Mr. Goldstein manifested in a judicial proceeding does not transmute Petitioners' un-immunized administrative conduct into immunized prosecutorial conduct.

In *Buckley*, this Court held that a prosecutor was not immune for conspiring to fabricate evidence that was presented to a grand jury and ultimately resulted in the plaintiff spending three years in custody.

Buckley, 509 U.S. at 275-76. Although the prosecutor was immune for presenting this evidence to the grand jury, he was not immune for helping to fabricate it; this was an investigatory act, not an act that could be considered intimately associated with the judicial process. *Id.* The only reason to fabricate evidence is in order to use it in an eventual prosecution - - either to establish probable cause to indict or as evidence at trial (and usually for both purposes). The mere act of fabricating the evidence, standing alone, would not have caused any harm to the plaintiff in *Buckley* - - it was the use of this evidence at a hearing to establish probable cause to incarcerate that caused harm to the plaintiff. Nonetheless, the prosecutor was not absolutely immune for this act of fabricating evidence. Similarly, the fact that Mr. Goldstein was harmed at trial by the Petitioners' administrative policies regarding the distribution of information and the training of line prosecutors on how to access this information "does not retroactively transform [the Petitioners' conduct] from the administrative into the prosecutorial." *Buckley*, 509 U.S. at 276.

As this Court made clear in *Buckley*, prosecutorial immunity analysis,

> focuses on the conduct for which immunity is claimed, not on the harm that conduct may have caused or the question whether it was lawful. The location of the injury may be relevant to the question whether a complaint has adequately alleged a cause of action for damages . . . . It is irrelevant, however, to the question whether the

> conduct of a prosecutor is protected by absolute immunity.

Buckley, 509 U.S. at 271-72.

The *Goldstein* decision cited to *Buckley*, stating that "[a]dministrative work cannot be 'retroactively transform[ed]' into the prosecutorial simply because 'the evidence this work produced' might affect whether a prosecutor decides to bring a case or, if a case is brought, how the evidence is presented at trial." *Goldstein*, 481 F.3d at 1176, *citing Buckley*, 509 U.S. at 275-76. Despite this clear instruction to focus on the activity performed, not the harm it is alleged to have caused, Petitioners and their *Amici* repeatedly attempt to shift the focus to the harm, the failure to disclose impeachment information about the informant that led to Goldstein's illegal conviction at trial. (Cert. Pet. at 14, 31; N.D.A.A. *Amicus* at 7, 10, 12.) This flies in the face of this Court's holdings in *Burns* and *Buckley*.

Nothing in the Ninth Circuit's opinion supports Petitioners' contention that the Ninth Circuit issued such a broad ruling that it would eliminate prosecutorial immunity for all of the training and supervision decisions made regarding line prosecutors. On the contrary, the Ninth Circuit cited with approval its ruling in *Genzler v. Longanbach*, 410 F.3d 630, 643-44 (9th Cir.), *cert. denied*, 546 U.S. 1031(2005), that a supervising prosecutor is absolutely immune for "conduct closely related to prosecutorial decisions in the trial phase of [the plaintiff's] case," including claims that supervisors knew about misconduct by prosecuting attorneys but failed to take action to remedy it. *Goldstein*, 481 F.3d at 1174.

This Court has been "quite sparing in [its] recognition of absolute immunity and [has] refused to extend it any further than its justification would warrant." *Burns v. Reed*, 500 U.S. at 478, 487 (1991) (internal quotation marks and citations omitted). Prosecutorial immunity from civil rights lawsuits was never intended to be an all-encompassing shield against misconduct by those who happen to be employed by prosecutors offices or have jobs that involve bringing criminal prosecutions. Rather, it has been understood to be a narrow exception to the literal reading of 42 U.S.C. § 1983 (which has no explicit exceptions) that was created for the functional necessity of protecting the judicial process. *See Buckley*, 509 U.S. at 268; *Imbler v. Pachtman*, 424 U.S. 409, 427-28 (1976).

Everything that a prosecutor's office does, including purely investigative or administrative activities, relates in some way to the prosecution of crimes. *See Burns*, 500 U.S. at 495. Prosecution of crimes is, after all, the ultimate purpose of the prosecutor's office. But this does not mean that everything done by a prosecutor is immune. *Id.* The type of reasoning advanced by Petitioners would allow what was intended to be a narrow exception to devour the rule. *See Burns*, 500 U.S. at 495.

In applying *Buckley* and *Burns*, the Ninth Circuit applied the functional test and found that the conduct alleged - - that the Petitioners failed to create an information management system so that line prosecutors could share information about informants with one another - - was an administrative activity.

C. Creation and Maintenance of an Information Management System Concerning Informants is Clearly Administrative.

The creation and maintenance of an inner-office information management system and training of employees on such a system is in fact an administrative function. Such information management systems are regularly developed by office managers in all types of offices, both governmental and non-governmental, including police departments and prisons, which track information on criminal history, witnesses, and potentially relevant evidence, but do not enjoy the special benefits of absolute immunity that Petitioners seek to utilize. *See, e.g., Anderson v. Creighton*, 483 U.S. 635 (1987) (police and law enforcement officials can only assert qualified immunity defense).

In his *amicus* brief, the Los Angeles District Attorney[2] explains that it has now implemented an informant information system and argues that the informant information system required great amounts of prosecutorial discretion to create. While Mr. Goldstein applauds the effort to create such a system, prosecutorial discretion is not necessary to fulfill the *Giglio* mandate. All that is required is to develop a list of objective information - - the informant names (and identifying information), the cases these informants

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[2] Although Los Angeles County is a party to this suit for the acts of its District Attorney's Office, this same District Attorney's Office submitted an "*amicus*" brief.

testified in, the benefits or promises that had been made to them, and the informant's criminal record or "rap sheet." Such objective data can then be kept by clerical staff whose administrative function is to collect information from files and other records. It is a ministerial act. It is a management function totally unrelated to prosecutorial judgment in trying a case. Thus, the purposes behind absolute prosecutorial immunity would not be served by its unwarranted expansion to the instant conduct.

Contrary to the Los Angeles District Attorney's claim that the database requires credibility[3] analysis of informants to compile (L.A.D.A. *Amicus* Br. at 5-6), the database should be a vehicle for collecting objective information about informants, which then can later be used by line district attorneys, district attorney staff, including paralegals and investigators, and police officers for multiple purposes, including investigations. That a prosecutor's office may broaden the database beyond *Giglio's* mandate for its own uses does not transform an administrative function into a prosecutorial one.[4] While prosecutorial discretion is

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[3] The Los Angeles District Attorney's Office attempts to turn the database obligation of *Giglio* into a prosecutorial function by morphing the database mandate into a use issue, *i.e.*, which informants the Office will use for trial proceedings. (L.A.D.A. *Amicus* Br. at 4-6.)

[4] Similarly, both *Amici* incorrectly claim that putting together such a system requires prosecutorial discretion. (L.A.D.A. *Amicus* Br. at 4, 5, and 12, 13; C.D.A.A. *Amicus* Br. at 11, 12.) The Los Angeles District Attorney's brief claims that management dissemination to filing deputies regarding "potential problems

incumbent in deciding what to disclose to defense counsel, what goes into a database and is shared within the office should be determined by uniform objective standards, not discretionary ones, in order to comply with *Giglio's* mandate. Indeed, prosecutorial analysis of the raw data being entered into an informant index is not only unnecessary and not required under *Giglio*, but may undermine the usefulness of the database to prosecutors seeking to extract objective information about informants. A prosecutor editing the information going into the

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with a jailhouse informant" is a prosecutorial function (L.A.D.A. *Amicus* Br. at 12-13) and the California District Attorneys Association attempts to make the same point by listing a number of factors claimed to implicate prosecutorial discretion. (C.D.A.A. *Amicus* Br. at 11-12.) Many of the factors identified in the California District Attorney's *amicus* brief as necessary to the exercise of prosecutorial judgment arise in the context of deciding whether to grant benefits in exchange for testimony, the timing of disclosure of benefits, not how to collect and internally disseminate information about benefits granted. (C.D.A.A. *Amicus* Br. at 11-12.) Other relevant factors identified by the *amicus* brief relate to the decision about whether to disclose those benefits to defense counsel in compliance with a *Brady* obligation. *Id.* In fact, the only factors that resemble the collection and dissemination of information are those uniquely administrative, not prosecutorial in nature, including the kind of documentation to be used to share informant information and the office resources available to create a system of recording and sharing this information. If anything, sifting through the factors raised and allocating them to their relevant functions only reinforces the administrative character of the conduct that Mr. Goldstein challenges in this case - - that the Petitioners failed to institute any system to collect, maintain and disseminate in the District Attorney's Office informant information.

database based on a "credibility" determination may exclude information that should be in the database or include erroneous subjective judgments.

Petitioners argue that the obligation to share information within district attorney's offices, mandated by *Giglio*, applies only to prosecutors and exists solely for the purpose of facilitating compliance with *Brady* disclosure obligations, so it must be a prosecutorial function. (Cert. Pet. at 29-30.) First, this argument is a red herring. As discussed above, the fact that the prosecutor illegally advised the police to hypnotize a suspect so that the confession could be *used* in court, *Burns*, and the fact that the prosecutor fabricated evidence to be *used* before the grand jury, *Buckley*, did not convert investigatory functions into prosecutorial functions.

Further, although *Giglio* deals specifically with prosecutors offices, Petitioners are wrong that the obligation to share information for the purpose of facilitating *Brady* disclosures applies only to prosecutors. Police have the same duty to share potentially exculpatory information with prosecutors in order to facilitate prosecutors' compliance with *Brady* and cannot claim absolute immunity for their failure to do so. *See, e.g.*, *Newsome v. McCabe*, 256 F.3d 747, 752-53 (7th Cir. 2001) (under qualified immunity analysis, although investigators have no *Brady* obligation to turn over exculpatory information to the defense, *Brady* requires that they turn over such evidence to the prosecutor); *Jean v. Collins*, 221 F.3d 656, 663 (4th Cir. 2000) (*en banc*) (police who deliberately withhold exculpatory evidence, and prevent prosecutors from complying with *Brady*,

violate due process clause). *See also*, *McMillian v. Johnson*, 88 F.3d 1554, 1567 (11th Cir. 1996); *Jones v. City of Chicago*, 856 F.2d 985, 995 (7th Cir. 1988).

Moreover, sharing potentially damaging information regarding informants among employees within district attorney's offices serves purposes other than fulfilling *Brady* disclosure obligations. Such a database has many uses - - while it may be used to assist prosecutors in fulfilling their *Brady* obligations, it may also assist prosecutors in their investigatory functions. Such information is relevant at the investigative stage before it has been determined whether there is probable cause to indict and can be used by investigators within district attorney's offices, and police agencies outside district attorney's offices working with district attorney's offices. The information can be used by district attorney's offices and police agencies to determine whether to investigate a case, how to investigate a case, and whether to use a particular informant in an investigation.

Accordingly, the Ninth Circuit's finding that the conduct in *Goldstein* was administrative in nature is the application of well-settled Supreme Court precedent and does not present an important question to be decided by this Court.

II. THE NINTH CIRCUIT OPINION DOES NOT CREATE A SPLIT IN AUTHORITY AND THE ONLY REASON THE PETITIONERS CONTEND THAT IT DOES IS BECAUSE THEY HAVE INCORRECTLY IDENTIFIED THE ISSUE IN THE CASE

There are no conflicts in lower court authority justifying review by this Court. The Petitioners' assertions (Cert. Pet. at 24-29) are simply wrong. There is no split on the issue presented in *Goldstein* because there are no other circuit cases in the country that address the administrative duty of prosecutor's offices to set up information management systems under *Giglio*. *Goldstein* is the only case dealing with this unique scenario, and as explained above, it is totally in keeping with general Supreme Court authority on prosecutorial absolute immunity.

In the absence of a split of authority, the Petitioners try to manufacture a split in a number of ways that do not withstand scrutiny. First, Petitioners cite to a variety of district court cases, published and unpublished, but purported conflicts between non-precedential trial court decisions do not warrant Supreme Court review. Supreme Court Rule 10(a) explicitly specifies that only a conflict in authority among cases in the "United States court of appeals" justifies review.[5]

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[5] Even when they cite a district court case that supposedly establishes a split in authority, Petitioners get it wrong. For example, Petitioners cite *Eisenberg v. District Attorney*, 1994 U.S. Dist. LEXIS 21535, *6 (E.D.N.Y. 1994), for the proposition that

Second, Petitioners try to assert that there is a mature, clear split in authority, ripe for review, on whether absolute immunity extends to "general prosecutorial policies." (Cert. Pet. at 26.) The supposed split is really between two cases, *Goldstein* and a twenty-year old, partially overruled, case out the District of Columbia, *Haynesworth v. Miller,* 820 F.2d 1245 (D.C. Cir. 1987), *partially overruled on other grounds, Hartman v. Moore*, 574 U.S. 250, 256 (2006), hardly a vibrant, mature split of authority that requires the Court's immediate attention.

But regardless of the posture of the *Haynesworth* and *Goldstein* decisions, the supposed split is nonexistent. As this Court, the *Haynesworth* court, and the *Goldstein* court recognize, the availability of absolute immunity turns on a functional analysis. The

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supervisory prosecutors can invoke absolute immunity for a failure to train or supervise. (Cert. Pet. at 26.) In truth, the court specifically held that a policy governing whether or not to file a charge is prosecutorial, and thus, supervision and training designed to implement this policy must be prosecutorial. However, the decision actually supports the *Goldstein* opinion, in that the court explicitly recognized that, "in other contexts, the training and supervision of employees might be characterized as administrative acts, not subject to the protection of absolute immunity." *Id.* at *6. Thus, this decision, like numerous others cited by Petitioners that deal with prosecutorial functions, such as filing or charging decisions, *see, e.g., Jones v. City of Boston,* 2004 U.S. Dist. LEXIS 12628, *11-*12 (D.Mass. 2004) and *Sheff v. City of New York*, 2004 U.S. Dist. LEXIS 4819, *18 (E.D.N.Y. 2004) (Cert. Pet. at 26), or disclosure of *Brady* material to defense counsel, *Truvia v. Julien* 2005 U.S. Dist. LEXIS 539, *4-*5 (D. LA. 2005) (Cert. Pet. at 26), are not at odds with the *Goldstein* opinion.

Ninth Circuit explicitly discusses *Haynesworth* in its opinion, explaining that the reason immunity existed in *Haynesworth* was because the challenged policy was a policy "regarding which cases to prosecute," meaning that it was necessarily a policy governing a prosecutorial function - - whether to file criminal charges. *Goldstein*, 481 F.3d at 1175. As the Ninth Circuit explained, while *Haynesworth* "demonstrate[s] that a policy decision *may* be protected by absolute immunity, the critical factor remains the nature of the challenged policy and whether it falls 'within a prosecutor's judicial function' or, instead, is part of a prosecutor's exercise of administrative or investigative functions." *Id.* (Emphasis in original.) Far from showing a split, *Goldstein*, which focuses on an information database concerning informants and not a filing decision, is a mainstream application of well-settled law.

Third, Petitioners try to assert that there is a mature, clear split of authority about whether absolute immunity extends to failure to train/supervise claims. (Cert. Pet. at 27.) Again, the split is imagined and hardly a subject of vibrant dispute among the circuits. The two cases Petitioners cite, one case also from the Ninth Circuit, *Modahl v. County of Kern*, 61 Fed.Appx. 394, 397 (9th Cir. 2003), and another twenty-two year old case from the Seventh Circuit, *Hamilton v. Daley*, 777 F.2d 1207, 1213 n.5 (7th Cir. 1985), do not conflict with *Goldstein*. *Goldstein* is in agreement with *Hamilton v. Daley*, which properly applied prosecutorial immunity for the supervision of line prosecutors in carrying out clearly prosecutorial activities - - subpoenaing witnesses who they knew would give false testimony. *Hamilton*, 777 F.2d at

1212-1213. Similarly, in *Modahl* - - a Ninth Circuit case[6] - - the court held that a district attorney was immune for managing line prosecutors on activities in preparation for a trial, *id.* at 397, clearly a prosecutorial duty, unlike the underlying activities at issue in *Goldstein* - - maintaining an index.

Petitioners cite two cases as siding with *Goldstein*, as providing evidence of a purported split in authority, *Walker v. New York*, 974 F.2d 293, 300 (2nd Cir. 1992) and *Carter v. City of Philadelphia*, 181 F.3d 339, 353 (3rd Cir. 1999). But these cases are factually distinguishable. *Walker* cannot be evidence of a split regarding the law of prosecutorial immunity because the case does not deal with absolute prosecutorial immunity, but instead addresses liability of a local government entity under *Monell v. New York City Dept. of Social Services*, 436 U.S. 658 (1978). *See Walker*, 974 F.2d at 296, 300. Furthermore, *Walker* addresses failure to train regarding *Brady* disclosures, which, as discussed above, is not at issue here. 974 F.2d at 300. *Carter* involved supervising prosecutors' failure to train police officers from "procuring perjurious 'eyewitnesses' and . . . [to alert] assistant district attorneys to the falsity of such information and [to prevent] its introduction as evidence," 181 F.3d at 343, allegations which are also not at issue here. Thus, *Carter* involved an investigatory or administrative function - - prosecutors supervising police in the investigation of crime.

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[6] Petitioners' citation to this case would seem to suggest they are claiming there is split of authority *within* the Ninth Circuit itself, an unusual basis for invoking review by this Court.

Even if the Court were to question *Walker* or *Carter* on their functional analysis,[7] the Ninth Circuit, far from relying on *Walker* and *Carter,* as the Los Angeles County District Attorney claims, merely references these cases in a footnote, noting that they arose "in a different context." *Goldstein*, 481 F.3d at 1176, n.2. The bottom line is that the well-reasoned decision in *Goldstein* is an improper vehicle for Petitioners to address concerns with *Walker* and *Carter*.

Fourth, the Petitioners claim that the "First and the Ninth Circuit" in three other cases, two out of the Ninth Circuit, *Roe v. City & County of San Francisco*, 109 F.3d 578 (9th Cir. 1997), and *Ybarra v. Reno Thunderbird Mobile Home Village*, 723 F.2d 675, 676 (9th Cir. 1984), and one in the First Circuit, *Harrington v. Almy*, 977 F.2d 37 (1st Cir. 1992) have allowed prosecutors to claim the protections of absolute immunity in administrative actions equal to *Goldstein*. (Cert. Pet. at 27, 28.) Petitioners are simply wrong. *Roe* and *Harrington v. Almy* deal with prosecutors' decisions whether or not to file criminal charges, and *Ybarra* deals with the duty to preserve or release exculpatory evidence, all clearly implicating

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[7] Notably, this Court denied *writs of certiorari* for review of *Carter* and *Walker*, *see Roe v. Carter*, 528 U.S. 1005 (1999); *Walker v. City of New York*, 507 U.S. 961 (1993); *City of New York v. Walker*, 507 U.S. 972 (1993), and it would make no sense to attempt to re-open review of these decisions through a review of *Goldstein's* much more conservative holding. However disagreeable the Los Angeles District Attorney finds these cases (L.A.D.A. *Amicus* Br. at 9-11) their holdings are not at issue in the instant case.

prosecutorial functions not in conflict with the *Goldstein* decision.[8]

All of the cases cited by the Petitioners, including *Goldstein,* are in agreement that prosecutors are immune for setting prosecutorial policies. Equally, none of the cases, including *Goldstein,* suggest that prosecutors have immunity for setting investigative or administrative policies. Essentially, Petitioners ask the wrong question. The relevant legal issue is not whether prosecutors are being sued for training and supervision but whether the training and supervision they are being sued for involve prosecutorial functions or investigative/administrative functions. Likewise, when prosecutors are sued for establishing general policies, the relevant issue is the type of policy being

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[8] In its order dismissing Petitioners' original claim of absolute immunity, the District Court explained how *Roe* was consistent with *Goldstein*:

> Defendants argue that *Roe* establishes that prosecutors' decisions not to prosecute any case, or all cases, investigated by a given police officer are 'prosecutive,' not administrative, even though they involve multiple cases, not just an individual case. From that characterization, Defendants conclude that their alleged misconduct, claimed to be systemic, is therefore 'prosecutive.' Not so; Defendants have missed the point of *Roe*. The reason that the Ninth Circuit upheld the dismissal of that case on grounds of absolute immunity was that the whole issue, the sole conduct, of defendants was about whether to *prosecute*. Here, in contrast, the SAC alleges a host of practices and policies concerning personnel administration, supervision, and methods of investigation."

(App. B at 20, n.2.)

established. The policies, training and supervision at issue in *Goldstein* all governed transparently administrative activities - - entering information into and retrieving information from a data indexing system.

Accordingly, there is no split in authority between *Goldstein* and any other circuit cases that needs to be addressed by this Court.

III. BECAUSE THE NINTH CIRCUIT DECISION IS NOTHING MORE THAN THE APPLICATION OF SETTLED LAW, THE DECISION WILL NOT OPEN THE "FLOODGATES" OR LEAD TO "VEXATIOUS" LITIGATION

Once the Ninth Circuit's holding is properly understood, it is clear that this case cannot have the wide-ranging impact that Petitioners and their *Amici* suggest.

First, a review of the cases decided since *Goldstein* do not indicate that there will be a flood of lawsuits. A search for cases citing to the *Goldstein* decision reveals that only two cases have cited to *Goldstein* for holdings on prosecutorial immunity, both held that prosecutors are in fact immune for failure to disclose exculpatory information to the defense.[9] *Turner v. City & County of*

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[9] There are two additional cases that cite to *Goldstein* in *dicta*: *Carter v. Clark County*, 2007 U.S.App. LEXIS 25665, *3, n.1 (9th Cir. 2007) (noting that *Goldstein* is not relevant because plaintiff had plead guilty before trial and therefore could not even claim he

Honolulu, 2007 U.S. Dist. LEXIS 32856, *13 (D.Haw. 2007); *Dillard v. Sanchez*, 2007 U.S. Dist. LEXIS 2623, *7-*8 (D.Or. 2007). In fact, *Turner* actually cites *Goldstein* for the rule that prosecutors are absolutely immune for "decisions to initiate a particular prosecution, to present knowingly false evidence at trial, and to suppress exculpatory evidence." 2007 U.S. Dist. LEXIS 32856 at *13. The courts are having no difficulty understanding the Ninth Circuit's holding in the instant case and the decision has not caused a flood of lawsuits to be filed against prosecutor's offices.

Second, Mr. Goldstein's case does not represent the type of "vexatious" lawsuit by a "disgruntled" defendant about which Petitioners and *Amici* claim they are concerned. (Cert. Pet. at 33; L.A.D.A. *Amicus* Br. at 11.) The undeniable facts establish that Mr. Goldstein spent 24 years in prison for a murder he did not commit. He is precisely the type of litigant who should have his day in court.

Third, *Goldstein* does not open the door to every supervisory lawsuit brought by any person connected to a crime against supervisors. In order to survive dismissal of a lawsuit, as a legal and a practical matter, a plaintiff would have to show that (1) he is

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had been injured by the failure to obtain exculpatory evidence) and *Jay v. Harris*, 2007 U.S. Dist. LEXIS 49334, *14-*15 (N.D.Cal. 2007) (citing *Goldstein* in *dicta* for the proposition that a prosecutor's directive to police and medical examiners telling them which homicides should be investigated and which should be ignored would be an investigative policy, not a prosecutorial policy, but further explaining that this point is moot "because plaintiff lacks standing.")

actually innocent; (2) he had his conviction overturned; (3) that there is a causal connection between his wrongful conviction and action or inaction by supervisory prosecutors (if the line prosecutor suppressed *Brady* material, unlike this case, that might break the causal chain by the supervisor); and (4) that the action is, as here, purely administrative (and not part of a prosecutorial effort in that particular case). These are no small hurdles, leaving a small class of plaintiffs who could even allege a claim against which absolute immunity would not bar the way.

Fourth, the Petitioners and their *Amici* ignore the continued availability of a qualified immunity defense, as if absolute immunity is the only defense they can assert, and this case is an all or nothing proposition for supervisory prosecutors. As the *Goldstein* court pointed out, "Van De Kamp and Livesay failed to make an alternative argument in the district court that the claims against them should be dismissed based on qualified immunity." *Goldstein*, 481 F.3d at 1172-73. Indeed, because Petitioners have made the strategic choice not to litigate qualified immunity, it is premature on interlocutory appeal to review this case. The Court should wait for a case where the record is fully developed as to absolute and qualified immunity rather than allow Petitioners to present the Court with an all or nothing choice that does not exist in the real world.

Qualified immunity is a defense generally that is available to all government officials and will further limit the number of viable lawsuits. Even if a plaintiff can show a causal connection between the administrative failure by supervisory prosecutors,

those prosecutors will still be protected from suit unless the plaintiff can show their administrative failure "violate[d] 'clearly established statutory or constitutional rights of which a reasonable person would have known." *Hope v. Pelzer*, 536 U.S. 730, 739 (2002) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). *Giglio* constitutes such clearly established authority in this instance and would have defeated a qualified immunity claim if one had been raised, but other administrative functions of supervisory prosecutors may not be governed by such clearly established law and will be subject to the protection of qualified immunity.[10]

In short, for practical reasons, the Ninth Circuit decision in *Goldstein* is limited to the facts of the case. It stands for the limited proposition that absolute immunity does not extend to supervisory prosecutors when they are sued by actually innocent, but wrongfully convicted, plaintiffs for their failure to set up an information management system of informant information as required by *Giglio* twenty-five years ago. Most prosecutors' offices have presumably complied with *Giglio*.

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[10] Other hurdles include under *Heck v. Humphrey*, 512 U.S. 477 (1994), that a plaintiff would have to first invalidate his prior conviction before proceeding with a civil rights suit alleging the failure to keep an informant database caused the conviction. In Goldstein's case, it took 24 years before his *habeas* petition was granted. Further, the plaintiff would have to meet any statute of limitations bar, which in California is only two years. *See Trimble v. City of Santa Rosa*, 49 F.3d 583, 585 (9th Cir. 1995) (*per curium*), Cal.Civ.Proc. § 340(3).

There is no reason for this Court to expend its resources to review this case. It is a straightforward application of Supreme Court precedent, and taking the case will not resolve any important questions of unsettled federal law.

CONCLUSION

For all the reasons stated above, Mr. Goldstein respectfully requests that this Court deny the petition for review.

Respectfully Submitted,

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Dated: March 3, 2008

REPLY BRIEF

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(5)

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SUPREME COURT, U.S.

In The

Supreme Court of the United States

JOHN VAN DE KAMP and CURT LIVESAY,

Petitioners,

vs.

THOMAS LEE GOLDSTEIN,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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INTRODUCTION

The respondent presents a simple argument as to why the present petition for writ of certiorari should be denied, claiming:

1) That petitioners have misrepresented the nature and scope of the decision below.

2) That contrary to petitioners' description of the lower court's opinion, the Ninth Circuit's decision was a straight-forward application of existing Supreme Court precedent to conduct what was clearly administrative and therefore clearly not eligible for protection by the absolute prosecutorial immunity.

3) That the clearly administrative conduct at issue was "Petitioners' failure to establish and train staff concerning an internal ***information management system*** that would ensure internal access to information concerning informants as mandated by *Giglio v. United States,* 405 U.S. 150, 154 (1972)". (Brief in Opposition, page i; emphasis added.)

The phrase "information management system" is so central to the respondent's argument that it is repeated nineteen separate times in the Brief in Opposition.

But there is a fundamental problem with the respondent's argument. The phrase "information management system" does not appear anywhere in this Court's *Giglio* opinion. Nor does it appear anywhere in the Ninth Circuit's opinion in this case. Nor did it appear in the district court's order denying

petitioners' motion to dismiss. In fact, it does not appear in ***any*** reported federal or state opinion that also cites to the *Giglio* opinion.

The phrase does not appear in the respondent's operative second amended complaint. Nor did it appear in the respondent's opposition to the petitioners' motion to dismiss, filed in the district court, or in the respondent's Appellee's Brief filed in the underlying appeal, or in the briefs the respondent filed in opposition to the petition for rehearing and rehearing *en banc*. The ***only*** time this phrase turned up prior to it becoming the central mantra of the respondent's Brief in Opposition was in the amicus brief of a group of criminal defender organizations filed in opposition to the petition for rehearing and rehearing *en banc*.

It is the respondent, not the petitioners, who is misrepresenting the underpinnings of this case to this Court. The *Giglio* decision did not impose an obligation on large prosecution offices to establish an "information management system", or anything similar. In fact, this Court did not impose any sort of mandate at all on prosecutors, other than the core *Brady* obligation to convey potential impeachment information to defendants, which this Court found in *Giglio* to include promises made and benefits given to prosecution witnesses. Nor was it a supposed failure to comply with this non-existing mandate to establish an "information management system" that caused the Ninth Circuit to deny absolute immunity to the petitioners.

It is understandable why the respondent would attempt to re-write the record in this manner. It is easy to argue that an obligation to create and maintain an "information management system", divorced from any discussion of when and how the information managed by the system is to be used, is nothing more than a simple administrative task, one that can be performed even by "clerical staff". (Brief in Opposition, page 19.) But the reality, as expressed by both this Court and the Ninth Circuit, is far less clear.[1]

1. THIS CASE IS *NOT* ABOUT "INFORMATION MANAGEMENT SYSTEMS"

Throughout his Brief in Opposition, the respondent asserts that the fundamental issue in this case is the petitioners' alleged failure to establish an "information management system". The respondent writes that:

> "The Second Amended Complaint alleged that Petitioners failed to set up an internal information management system concerning informants and failed to train employees concerning ***that system***". (Brief in Opposition, page 10; emphasis added.)

---

[1] The respondent's suggestion also ignores the fact that three decades ago, when *Giglio* was decided and the respondent's case was tried, the sort of sophisticated, computerized information management systems that exist today, and which can be easily managed by clerical staff, not only didn't exist, but weren't even dreamed of.

But the actual language of the complaint, as quoted by the respondent himself in his Brief, makes a far broader allegation; specifically, that the petitioners failed to create a system, or to train, or to supervise, their deputies "to ***provide*** to [other] Deputy District Attorneys ... information with regard to jailhouse informants" and that the petitioners "failed to instruct" their deputies to "disseminate throughout the office" such impeachment information". (Brief in Opposition, page 10; emphasis added.)

In describing the Ninth Circuit's opinion, the respondent writes that:

> "It was this failure to create an information management system to share data on informants among employees in the prosecutor's office (and failure to train them to use ***this non-existent system***) that the Ninth Circuit found to be un-immunized, administrative conduct". (Brief in Opposition, page 12; emphasis added.)

But the actual language of the opinion, again as quoted by the respondent himself in his Brief, presents a much broader critique of the petitioners' actions.

> "[Petitioners'] failure to promulgate policies ***regarding the sharing of information*** relating to informants and their failure to adequately train and supervise deputy district attorneys ***on that subject***, bear a close connection only to how the District Attorney's Office was managed, not to whether or how

> to prosecute a particular case or even a particular category of cases."

Goldstein v. City of Long Beach, 481 F.3d 1170, 1176 (9th Cir. 2007) (quoted at Brief in Opposition, pages 12-13).

The respondent is emphatic throughout his Brief that the petitioners' supposed obligation to establish an "information management system" came directly from this Court's opinion in *Giglio*:

- "their administrative failure to ... create an information management system within their office regarding informants as ***required*** by the Supreme Court in *Giglio*"
- "they failed to set up an internal information management system for informant witnesses ... as ***directed*** by *Giglio*"
- "supervisory prosecutors' purely administrative failure to set up an information management system as ***required*** by *Giglio*"
- "the database obligation ***of*** *Giglio*"
- "the administrative duty of prosecutor's office's to set up information management systems ***under*** *Giglio*"
- "their failure to set up an information management system of informant information as ***required*** by *Giglio*"

(Brief in Opposition, pages 1, 4, 19 n.3, 23, and 32; all emphasis added.)

Despite the respondent's constant drumbeat in his Brief in Opposition, the issue that was actually before this Court in *Giglio* had nothing to do with whether or not prosecutors' offices should be required to set up "information management systems", or even whether they had any office-wide obligations at all. What ***was*** at issue was the simple question of whether a criminal defendant's due process rights are violated when the prosecution fails to inform him or her of promises that have been made to prosecution witnesses.

> "While appeal was pending in the Court of Appeals, defense counsel discovered new evidence indicating that the Government had failed to disclose an alleged promise made to its key witness that he would not be prosecuted if he testified for the Government. We granted certiorari to determine whether the evidence not disclosed was such as to require a new trial under the due process criteria of *Napue v. Illinois,* 360 U.S. 264 (1959), and *Brady v. Maryland,* 373 U.S. 83 (1963)."

Giglio, supra, 405 U.S. at 150-151. This Court concluded that:

> "Here the Government's case depended almost entirely on Taliento's testimony; without it there could have been no indictment and no evidence to carry the case to the jury. Taliento's credibility as a witness was

> therefore an important issue in the case, and evidence of any understanding or agreement as to a future prosecution would be relevant to his credibility and the jury was entitled to know of it.
>
> For these reasons, the due process requirements enunciated in *Napue* and the other cases cited earlier require a new trial, and the judgment of conviction is therefore reversed and the case is remanded for further proceedings consistent with this opinion."

Id. at 154-155.

In reaching this decision, this Court had to address the fact that the Assistant United States Attorney who had prosecuted the defendant was not aware of the promise that had been made to his key witness. This Court concluded that that was irrelevant.

> "[W]hether the nondisclosure was a result of negligence or design, it is the responsibility of the prosecutor. The prosecutor's office is an entity and as such it is the spokesman for the Government. A promise made by one attorney must be attributed, for these purposes, to the Government."

Id. at 154.

It was only in ***this*** context that this Court mentioned procedures that could be followed by prosecutors' offices, and on close analysis it is clear that this

mention was nothing more than *dicta,* a simple comment by this Court that the obligation of conveying this information to defendants would not impose an impossible burden on even large prosecution offices.

> "To the extent this [i.e. the attribution of a promise by an individual prosecutor to the office as a whole] places a burden on the large prosecution offices, procedures and regulations can be established to carry that burden and to insure communication of all relevant information on each case to every lawyer who deals with it."

Ibid.

But this Court was not "requiring" or "directing" prosecutors' offices to do anything, other than turn over to defendants information about promises made to prosecution witnesses. This Court was simply noting that those offices "***can***" establish "procedures and regulations ... to insure communication of all relevant information on each case to every lawyer who deals with it", ***if they so choose***; but if they choose not to, they must be prepared to accept the consequences, i.e. the reversal of convictions.

This analysis is confirmed by this Court's discussion of the *Giglio* decision in *Kyles v. Whitley,* 514 U.S. 419, 438 (1995), in which "[t]he State of Louisiana ... plead[ ] that some of the favorable evidence in issue here was not disclosed even to the prosecutor until after trial".

> "To accommodate the State in this manner would, however, amount to a serious change of course from the *Brady* line of cases. In the State's favor it may be said that no one doubts that police investigators sometimes fail to inform a prosecutor of all they know. But neither is there any serious doubt that 'procedures and regulations can be established to carry [the prosecutor's] burden and to insure communication of all relevant information on each case to every lawyer who deals with it.' *Giglio v. United States,* 405 U.S. 150, 154, 31 L. Ed. 2d 104, 92 S. Ct. 763 (1972). Since, then, the prosecutor has the means to discharge the government's *Brady* responsibility ***if he will,*** any argument for excusing a prosecutor from disclosing what he does not happen to know about boils down to a plea to substitute the police for the prosecutor, and even for the courts themselves, as the final arbiters of the government's obligation to ensure fair trials."

Ibid., emphasis added.

That this Court's comment in *Giglio* about establishing procedures should be viewed as nothing more than *dicta* is easily demonstrated. One need only imagine a situation where such "procedures and regulations" have been established, but despite that information about a promise made to a prosecution witness somehow does not get passed on to the prosecutor handling a case, and thus is not made known to the defendant. Would this "substantial compliance"

eliminate the defendant's claim that his or her due process rights were violated? Of course not.

So there can be no question that the comment about the establishment of "procedures and regulations" was not necessary to the decision or to the rule being established by the case (i.e. that this sort of information has to be provided to the defense). Whether or not such policies existed, just as the motivation or actual knowledge of the line prosecutor, was simply irrelevant.

The bottom-line here is that the very foundation of the respondent's attack on the petition for writ of certiorari is non-existent, and thus provides no basis for denying this petition.[2]

2. THE NINTH CIRCUIT'S OPINION DOES NOT SIMPLY APPLY EXISTING SUPREME COURT PRECEDENT

As the discussion in Section 1 makes clear, the Ninth Circuit's opinion did not simply mechanistically apply a supposed mandate by this Court that

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[2] This analysis also shows that the Ninth Circuit erred when it asserted in its opinion in this case that "[s]everal years prior to Goldstein's arrest and conviction, the Supreme Court explained that prosecutors' offices have a ***constitutional obligation*** to establish 'procedures and regulations ... to insure communication of all relevant information on each case [including promises made to informants in exchange for testimony in that case] to every lawyer who deals with it.' [Citation.]" *Goldstein, supra*, 481 F.3d at 1172; emphasis added.

large prosecution offices maintain "information management systems" relating to informants. Rather, the lower court was obliged to address the question that arises in every case involving a claim of absolute prosecutorial immunity: is the conduct in question covered by that immunity, i.e. is that conduct fundamentally prosecutorial in function? See *Goldstein, supra,* 481 F.3d at 1173.

The Ninth Circuit recognized that the answer to that question in this particular case could not be determined by simple application of existing precedent. "Neither the Supreme Court nor this Court has considered whether claims regarding failure to train, failure to supervise, or failure to develop an office-wide policy regarding a constitutional obligation, like the one set forth in *Giglio,* are subject to absolute immunity." *Id.* at 1174.

The Brief in Opposition does not meaningfully respond to the arguments made by the petitioners as to why the Ninth Circuit erred in concluding that their conduct was not prosecutorial in function. The respondent instead simply expounds on his assertion that all that is at issue here is a failure to create a constitutionally mandated "information management system". The respondent's only direct response to the petitioners' arguments is to complain about their statement that "[t]he obligation recognized by the Court in *Giglio* is one imposed explicitly, and exclusively, on prosecutors". (Petition, pages 29-30.) But the respondent then acknowledges that "*Giglio* deals specifically with prosecutors offices", and is only able

to discuss how ***Brady*** obligations, not those imposed by *Giglio*, can apply to police as well as prosecutors. (Brief in Opposition, page 21.)

The respondent's comments confirm that the obligation of disclosure imposed by *Giglio* is inextricably intertwined with, and is an essential part of, the prosecutorial function. Yet the Ninth Circuit found otherwise. Neither it, nor the respondent, has yet to offer a coherent explanation of how that can be, given the nature and scope of the obligation imposed ***on prosecutors*** by this Court in *Giglio*.

3. THE NINTH CIRCUIT'S OPINION CAN AND WILL BE APPLIED BROADLY

The respondent argues that there is no need for this Court to review the Ninth Circuit's opinion because it is so factually specific that it will only apply to an extremely limited group of potential plaintiffs. That might be so if what was at issue here was, as the respondent urges, simply a constitutionally mandated obligation to establish an information management system. But as has been discussed, that is ***not*** what is at issue here.

As noted above, the Ninth Circuit itself acknowledged that "[n]either the Supreme Court nor this Court has considered whether claims regarding failure to train, failure to supervise, or failure to develop an office-wide policy regarding a constitutional obligation, like the one set forth in *Giglio*, are subject to absolute immunity." *Goldstein, supra,* 481

F.3d at 1174. ***That*** is the broad question that the Ninth Circuit resolved in this case, finding that the petitioners' alleged "failure to promulgate policies regarding the sharing of information relating to informants and their failure to adequately train and supervise deputy district attorneys on that subject" was "not prosecutorial in function and does not warrant the protections of absolute immunity." *Id.* at 1176. The Ninth Circuit has thus left the door wide-open for any potential plaintiff to assert that the policy and training decisions of supervising prosecutors are actionable because they are administrative in function rather than prosecutorial.

There is nothing about the nature of ***that*** finding that will limit its application to plaintiffs who are convicted and later have those convictions overturned, as the respondent has suggested. (See Brief in Opposition, pages 3 and 30-31.) Neither the language nor the logic of the Ninth Circuit's opinion would in any way prevent a criminal defendant who is acquitted from also being able to sue, claiming that the only reason he or she was prosecuted at all was because of the faulty policies of, or training and/or supervision by, one or more management-level prosecutors. The reality is that this decision ***does*** open the door to a potential flood of lawsuits.

The respondent argues that qualified immunity will be a sufficient protection for supervising prosecutors, but then suggests that such a defense can only be considered after the record has been "fully developed". (See Brief in Opposition, pages 31-32.) But

such a rule would mire supervising prosecutors – from elected District Attorneys down to mid-level managers – in extensive discovery while the record is being "developed", thereby undermining this Court's long-standing recognition of "the importance of resolving immunity questions at the earliest possible stage in litigation." *Hunter v. Bryant,* 502 U.S. 224, 227 (1991).

Absolute immunity generally does not require that the record be extensively developed. Its application depends on the answer to a simple question: taking the plaintiff's allegations at face value, are the alleged actions of the defendant immunized? The allegations made by the respondent in this case fit comfortably into that structure, and so there is no reason to delay resolving that question in this case, or similar questions that may be posed in the future regarding the actions of other supervising prosecutors.

CONCLUSION

The respondent has failed to meaningfully challenge the arguments offered by the petitioners in support of this Court granting certiorari. There ***is*** good cause for granting the petition, and the petitioners urge this Court to do so.

DATED: April 2, 2008

Respectfully submitted,

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AMICUS CURIAE BRIEF

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IN THE SUPREME COURT OF THE UNITED STATES

JOHN VAN DE KAMP and CURT LIVESAY,
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v.

THOMAS LEE GOLDSTEIN,
Respondent.

On Petition For Writ Of Certiorari To The United States Court of Appeals For the Ninth Circuit

AMICUS CURIAE BRIEF IN SUPPORT OF PETITIONERS VAN DE KAMP AND LIVESAY BY THE LOS ANGELES COUNTY DISTRICT ATTORNEY ON BEHALF OF LOS ANGELES COUNTY

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AMICUS CURIAE BRIEF IN SUPPORT OF PETITIONERS VAN DE KAMP AND LIVESAY BY THE LOS ANGELES COUNTY DISTRICT ATTORNEY ON BEHALF OF LOS ANGELES COUNTY

Amicus curiae, Steve Cooley, District Attorney for the County of Los Angeles, State of California, submits this brief for filing in support of the petition for a writ of certiorari to review the judgment of the Ninth Circuit Court as the authorized law officer of the county, pursuant to Supreme Court Rule 37.2(a) and 37.4.[1] Counsel of record for all parties received notice

1. Los Angeles County Charter section 25 (1995) states:

> Each County officer, Board or Commission shall have the powers and perform the duties now or

(continued...)

at least 10 days prior to the due date of the *amicus curiae*'s intention to file this brief.

INTEREST OF AMICUS CURIAE

The Los Angeles County District Attorney's Office is the largest district attorney's office in the United States, employing approximately 1000 attorneys and prosecuting 60,000 felonies and 200,000 misdemeanors per year. [2] A significant number of dedicated prosecutors serve as managers and administrators responsible for training, setting policies, and supervising trial attorneys and support staff. These supervisors make daily decisions affecting ongoing trials, crime charging and case settlement. The difficulties facing talented supervising attorneys who serve their community would be exacerbated if the attorneys were required to face the potential loss of absolute immunity.

(...continued)

> hereafter prescribed by general law, and by this Charter as to such officer, Board or Commission.

(Footnote omitted.) It is provided in the California general law that:

> The district attorney is the public prosecutor, except as otherwise provided by law. The public prosecutor shall attend the courts, and within his or her discretion shall initiate and conduct on behalf of the people all prosecutions for public offenses.

Cal. Gov't Code § 26500 (West 1998).

2. http://da.co.la.ca.us/oview.htm last viewed on January 22, 2008.

SUMMARY OF ARGUMENT

The decision in *Goldstein* by the Ninth Circuit diverges from a majority of the Circuits in erroneously classifying important prosecutorial functions which merit absolute immunity as merely administrative. Training trial prosecutors to be effective and ethical advocates is an ongoing process, one that often requires the supervising prosecutor to assist the trial deputy mid-trial. Supervising attorneys should be allowed to establish policies for crime charging and settling cases without concern for having to defend their actions against vexatious litigation. *Goldstein* mistakenly characterizes the accumulation, analysis and dissemination of jailhouse informant information as administrative and removes the protection of absolute immunity.

ARGUMENT

I. THE METHOD AND TIMING OF IMPLEMENTING A DATABASE OF JAILHOUSE INFORMANTS FOR DISSEMINATION TO PROSECUTORS FOR CRIME CHARGING AND TRIAL PURPOSES IS INTIMATELY CONNECTED TO THE JUDICIAL PHASE OF THE CRIMINAL PROCESS

This Court has adopted a functional analysis in determining prosecutorial absolute immunity. A prosecutor will be absolutely immune for prosecutorial functions "intimately associated with the judicial phase of the criminal process." *Imbler v.*

Pachtman, 424 U.S. 409, 430 (1976). The focus is therefore on the prosecutorial function, not prosecutorial acts or conduct, in determining the scope of immunity.

A prosecutor is absolutely immune when functioning as an advocate in respect to judicial proceedings. *Imbler,* 424 U.S. at 430; *Malley v. Briggs,* 475 U.S. 335, 342 (1986); *Burns v. Reed,* 500 U.S. 478, 486 (1991); *Buckley v. Fitzsimmons* 509 U.S. 259, 269-270, (1993). This function, while judicially related, is not limited to the courtroom setting. *Burns,* 500 U.S. at 486; *Buckley,* 509 U.S. at 269-270.

The management and dissemination of potentially discoverable evidence is clearly a unique aspect of the prosecutorial function and intricately connected to the trial of cases. The *Imbler* test, determining which prosecutorial activities are based on the function test, clearly places the management of potentially discoverable material in the category of trial preparation.

In *Goldstein,* the Ninth Circuit mistakenly characterized the delay in establishing a database for dissemination of jailhouse informant information for deputy district attorneys preparing for trial as administrative. The error in this approach is clear when the response to the jailhouse informant problems, enacted by the Los Angeles County District Attorney is examined. Without threat of losing absolute immunity, the Los Angeles County District Attorney did in fact create a central clearing house of jailhouse informants using modern technology. The Los Angeles County jailhouse informant system has required years of preparation,

discussion with law enforcement agencies, advances in technology, and has received plaudits from the defense bar.

> In Los Angeles County, the use of jailhouse informant testimony has been significantly curtailed in the past 15 years according to the county's assistant DA and Gigi Gordon, director of the Post Conviction Assistance Center in Los Angeles. In the wake of a "devastating report" on jailhouse informants issued by the county grand jury in 1990, the Los Angeles district attorney's office adopted policies to "strictly control" the use of informant witnesses. *Now, use of informants as witnesses must be approved by a committee overseen by the chief deputy DA.* Because of these controls, jailhouse informants were used in "fewer than a dozen of the thousands of trials over the last three years." Gordon said that Los Angeles County has done "a fabulous job" of addressing the problem since it was revealed.

Scott Ehlers , Column: State Legislative Affairs Update, *30 Champion 52,* (2006) (Italics added.)

Thus, the committee, which includes the Chief Deputy District Attorney, participates with the trial attorney in determining which informants may be relevant and trustworthy. This determination would require evaluation of the credibility of the informant and a comparison of the informant's purported testimony with other evidence. This is clearly a trial

preparation function not purely administrative. Maintaining a database would also be a trial preparation function requiring an experienced trial attorney's judgment as to what information is relevant and material, and what is not. Experienced trial attorneys are the only personnel assigned to make these determinations for that reason.

Some management functions are strictly bureaucratic in nature; activities that all government managers must perform, whether they are running a school district or the District Attorney's office. Examples of such activities include management of the budget and applying for state and federal grant money. Managing the budget is not intimately connected to the trial and prosecution of criminal cases, nor is applying for grant money.

Other policies implemented by the District Attorney are also not intimately associated with the judicial phase of the criminal process. The Los Angeles County District Attorney sponsors a number of community outreach and crime prevention programs which are intended to improve the community and deter people from committing crimes. This management choice is not intimately connected with the judicial phase of the criminal process. Therefore, the participants and the management would not be entitled to absolute immunity for lawsuits arising from those functions.

Conversely, the management of the District Attorney's office has the responsibility for filing criminal charges and determining what cases to prosecute. The decision to file a case is based on factual input derived from police reports, knowledge by the filing deputy of the law, and application of the

policies of the District Attorney. For example, Los Angeles County District Attorney policy requires interviews of victims in sexual assault cases whenever feasible. This interview allows the filing deputy to make an assessment of credibility and determine the appropriate charges. This 'filing' function has been determined to be uniquely prosecutorial and thereby protected by absolute immunity, even when the filing decision has become a policy relating to an entire class of cases.

> Roe claims that even if absolute immunity exists for the typical, single-case situation in which a disgruntled victim resents the prosecutor's failure to prosecute, absolute immunity should not exist for a decision involving a whole line of cases, such as the decision made here of not prosecuting any of an officer's unwitnessed arrests.
>
> This argument is unpersuasive. In analyzing the rational underpinnings of absolute prosecutorial immunity in this context, there is "no meaningful distinction between a decision on prosecution in a single instance and decisions on prosecutions formulated as a policy for general application." *Haynesworth v. Miller*, 261 U.S. App. D.C. 66, 820 F.2d 1245, 1269 (D.C. Cir. 1987). "Both practices involve a balancing of myriad factors, including culpability, prosecutorial resources and public interests" and "both procedures culminate in initiation of criminal proceedings against particular defendants, and in each it is the individual prosecution that

> begats the asserted deprivation of constitutional rights." *Id.*

Roe v. City & County of S.F., 109 F.3d 578, 583-584 (9th Cir. 1997).

II *GOLDSTEIN'S* DIVERGENCE FROM THE MAJORITY OF THE CIRCUITS ERODES PROSECUTORIAL IMMUNITY AND CREATES NEW AVENUES FOR HARASSING LITIGATION

As discussed in the Petition for Certiorari, *Goldstein* is in direct conflict with other Circuits. The cases which *Goldstein* purports to follow are clearly wrongly decided.

A case outside of the Ninth Circuit, *Walker v. N.Y.*, 974 F.2d 293 (2d Cir. 1992), was relied on by the Court in *Goldstein* for holding that there is no absolute immunity for a prosecutor's "training function". In *Walker*, the trial deputy district attorney (referred to in New York as an ADA) actually committed a crime and suborned perjury in his misconduct. Any layperson knows that this is wrong. Yet the *Walker* court opined that the District Attorney's office breached its duty to train by failing to remind lawyers to not commit crimes. *Walker* is wrongly decided and should not be followed because of the extraordinary factual situation in *Walker*. *Walker* should be viewed as an anomaly generated out of criminal conduct by a deputy district attorney who could not be sued pursuant to 42 U.S.C.A. § 1983. The remedy in *Walker* for that particular miscarriage of justice was reversal of the charges against Walker and the potential of prosecuting the

ADA for his criminal conduct or exposing him to professional discipline. None of these remedies require distorting absolute immunity or are limited by it.

The Court in *Goldstein* also cited *Carter v. City of Phil.*, 181 F.3d 339 (3d Cir. 1999) to support its position. As with *Walker*, *Carter* was an anomaly which should not be followed.

> Raymond Carter had been convicted of murder and had served ten (10) years of a life sentence without possibility of parole before his conviction was overturned and the case against him *nol prossed* following disclosures of long-standing corruption within Philadelphia's 39th Police District.[n3] Carter then brought an action against the City of Philadelphia, named police officers, unknown employees of the Philadelphia Police Department, and unknown policymakers within the Philadelphia DA's Office.
>
> [n3] During disclosures of police misconduct uncovered during an investigation of that district, it came to light that the single eyewitness's testimony placing Carter at the murder scene - the testimony on which his conviction rested - was purchased by a 39th District officer, Thomas Ryan, from a prostitute-informant (Ms. Jenkins) with whom Ryan was intimate. In subsequent proceedings, Ryan was convicted of obstruction of justice and Jenkins admitted her perjured testimony. There

> was no forensic evidence linking Carter to the crime scene and Carter maintains his innocence.

Carter v. City of Phil., 181 F.3d 339, 342-343 (3d Cir. 1999)(footnotes 4 and 5 omitted).

As *Walker* was the result of an ADA committing a crime, *Carter* was the tragic result of a police officer committing a crime and being punished for it. Unfortunately, the *Carter* Court targeted others to be punished also.

> Carter's action against individuals in the DA's Office was premised on their failure as administrators to establish training, supervision and discipline policies which would have (a) prevented or discouraged Philadelphia police officers from procuring perjurious "eyewitnesses" and (b) alerted assistant district attorneys to the falsity of such information and prevented its introduction as evidence. The District Court dismissed all claims against the DA's Office, pursuant to Fed. R. Civ. P. 12(b)(6) concluding that those defendants were "state officials" and therefore immune from suit for acts in their professional capacity by virtue of the Eleventh Amendment. It further concluded that Carter had failed to state a cause of action against those defendants in their personal capacities.

Carter v. City of Phil., 181 F.3d 339, 342 (3d Cir. 1999)(footnotes omitted).

Carter represents ignorance of the limits of training. Reminding police officers not to have illicit relationships with prostitutes or suborn perjury would only insult honest police officers and would certainly not deter those officers determined to violate moral standards and the law. No filing deputy has a crystal ball or the ability with enhanced training to detect an illegal sexual liaison between a police officer and a prostitute/informant. A filing deputy district attorney reads reports, occasionally interviews victims and is expected to be aware of the applicable law. A trial deputy district attorney, even after enhanced training would not likely detect the *Walker-Carter* level of deception. As in *Walker*, *Carter* involved egregious criminal behavior which deprived Carter of his freedom. The *Carter* Court was eager to make everyone, even those civil servants tangentially involved, pay a price without thoughtful analysis.

The Court in *Carter* cited *Walker* with approval when it reinstated Carter's cause of action. Careful review does not support viewing those two cases as persuasive authority.

Moreover, if the decision in *Goldstein* is not corrected, a disgruntled defendant could circumvent the absolute immunity afforded to prosecutors' filing decisions by suing the District Attorney management. If the lawsuit were based on a failure to train filing deputies, the erroneous application of the function test by *Goldstein* would destroy absolute

immunity for the elected District Attorney. If a filing deputy failed to read all of the submitted police reports and erroneously filed charges against a defendant later determined to be innocent, the defendant may file a civil action against the deputy district attorney and the elected District Attorney. The filing deputy district attorney would have absolute immunity for the erroneous filing. If the defendant alleged the elected district attorney failed to train the filing deputies properly, the elected District Attorney would not have absolute immunity under *Goldstein*. Failure to train would be the basis for the cause of action and based on *Goldstein*, absolute immunity would have evaporated.

Goldstein opens the door to a plethora of vindictive lawsuits against past and current elected District Attorneys on amorphous "failure to train" causes of action. Large urban District Attorney offices, like Los Angeles, have a training division which is primarily responsible for training new prosecutors and ongoing training of experienced prosecutors. Training Divisions are staffed by career prosecutors working to enhance professionalism among prosecutors. Hanging this proverbial sword of Damocles over administrators and training staff would result in the unintended consequence of limiting or eliminating training programs. Qualified staff would decline assignments to train or supervise out of fear. The potential for harassing litigation would have a chilling effect on vigorous proactive training divisions.

Management dissemination of information to filing deputies regarding potential problems with a police officer's credibility as in *Roe* is exactly the same function as dissemination of information to

filing deputies regarding potential problems with a jailhouse informant. The Ninth Circuit found the first example to be uniquely prosecutorial in *Roe* but not uniquely prosecutorial in *Goldstein*. In both situations, the process is intimately connected with the judicial function of the prosecutor and cannot be arbitrarily distinguished.

If the trial deputy in *Goldstein* had failed to disclose the exculpatory evidence, he could not have been sued since he would have been entitled to absolute immunity. *See Imbler*.[3]

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3. County prosecutors were entitled to absolute immunity on citizen's § 1983 claim that they withheld exculpatory evidence prior to citizen's trial on charges of kidnapping, rape, and murder. 42 U.S.C.A. § 1983. *Yarris v. County of Del.*, 465 F.3d 129 (3d Cir. 2006).

State prosecutor is absolutely immune from action for damages brought under Civil Rights Act, 42 U.S.C.A. § 1983, based upon alleged use of false testimony or suppression of exculpatory evidence at trial. *Hauptmann v Wilentz* 570 F Supp 351 (D.N.J. 1983), affd without op, 770 F2d 1070 (3d Cir.*), cert den* 474 U.S. 1103 (1986).
District attorneys had absolute immunity from criminal defendant's claims against them for their actions in initiating and prosecuting criminal investigation and for their alleged improper conduct in withholding exculpatory evidence. *Douris v. Schweiker*, 229 F. Supp. 2d 391 (E.D. Pa. 2002).

Prosecutor was entitled to absolute immunity from claim under 42 U.S.C.A. § 1983 that prosecutor had withheld evidence that shooting victim had shot herself to frame claimant, her former husband, where alleged suppression of exculpatory evidence was squarely within range of prosecutorial functions to which immunity applies. *Carter v Burch*, 34 F3d 257 (4th Cir.. 1994), *cert den* 513 U.S. 1150.

Section 1983 claims asserted against prosecutor in his

(continued...)

CONCLUSION

The importance of granting certiorari is not limited to correcting the erroneous decision below. It extends to the need to clearly settle whether litigants can embroil prosecutors in complex litigation simply by casting their pleadings as "failing to supervise or failing to train."

Respectfully submitted,

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(...continued)

individual capacity stemming from his direct participation in suppression of *Brady* evidence in criminal prosecution were barred by absolute prosecutorial immunity. 42 U.S.C.A. § 1983. *Truvia v. Julien*, 187 Fed. Appx. 346 (5th Cir. 2006).

AMICUS CURIAE BRIEF

(3)

No. 07-854

FILED

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SUPREME COURT, U.S.

In The

Supreme Court of the United States

JOHN VAN DE KAMP and CURT LIVESAY,

Petitioners,

vs.

THOMAS LEE GOLDSTEIN,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF *AMICI CURIAE* NATIONAL DISTRICT ATTORNEYS ASSOCIATION, CALIFORNIA DISTRICT ATTORNEYS ASSOCIATION, NATIONAL ASSOCIATION OF PROSECUTOR COORDINATORS, NATIONAL HISPANIC PROSECUTORS ASSOCIATION, NEVADA ADVISORY COUNCIL FOR PROSECUTORS, AND NEVADA DISTRICT ATTORNEYS ASSOCIATION, IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether top level elected and management prosecutors should be held liable for failing to institute procedures relative to the collection, evaluation and dissemination of information used in criminal prosecutions.

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INTEREST OF *AMICI*[1]

The National District Attorneys Association (NDAA) is the largest and primary professional association of prosecuting attorneys in the United States. The association has approximately 7,000 members, including most of the nation's local prosecutors; assistant prosecutors; investigators; victim witness advocates; and paralegals. The mission of the association is, "To be the voice of America's prosecutors and to support their efforts to protect the rights and safety of the people." NDAA provides professional guidance and support to its members, serves as a resource and education center, produces publications, and follows public policy issues involving criminal justice and law enforcement.

The California District Attorneys Association (CDAA), the statewide organization of California prosecutors, is a professional organization incorporated as a nonprofit public benefit corporation in 1974. CDAA has over 2,500 members, including elected and appointed district attorneys, the Attorney General of California, city attorneys principally

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[1] Pursuant to Rule 37.2(a), *amici* gave notice to petitioners and respondent on January 18, 2008 of the intention to file this *amicus curiae* brief. Notice was transmitted via FAX, email and U.S. Post. Both parties have consented to the filing of the brief.

Pursuant to Rule 37.6, *amici* advise that no counsel for any party to this action authored any part of this brief, and no person other than *amici* made any monetary contribution to fund the preparation or submission of this brief.

engaged in the prosecution of criminal cases, and attorneys employed by these officials. The association presents prosecutor's views as *amicus curiae* in appellate cases when it concludes that the issues raised in such cases will significantly affect the administration of criminal justice.

The National Association of Prosecutor Coordinators (NAPC) is the only national professional association of prosecutor coordinators. It consists of 45 member states. Prosecutor Coordinators are the professional individuals in each state who serve the state prosecutors by assisting them in the administration of their offices and the pursuit of justice. Prosecutor Coordinators identify, develop and implement training and resource programs for state prosecutors and their supporting personnel. In addition, they monitor criminal law as it develops in state legislatures and alert District and State's Attorneys regarding proposed criminal justice legislation. The charter under which individual Prosecutor Coordinators operate varies according to the individual state's organization. All members have the common mission of providing the most effective professional training and resources available for prosecutors.

The National Hispanic Prosecutors Association (NHPA) was founded in 1997, is the only professional membership organization dedicated to the advancement of Hispanics as prosecutors, and is comprised of over 100 prosecutors nationwide, including both chief and line prosecutors nationwide, from all 50 states. NHPA goals include serving as a national voice for

the fair administration of justice, and providing testimony before Congress and other federal and state legislative bodies as well as national and local leadership on issues of concern to the administration of justice and the community.

The State of Nevada Advisory Council for Prosecuting Attorneys is an executive branch state agency responsible under Nevada Revised Statutes 241A.070 for providing leadership, resources and legislative advocacy on legal and public policy issues related to the duties of Nevada's prosecutors and the administration of justice. These statutory responsibilities extend to approximately 450 state and local prosecutors, including the Attorney General of Nevada, Nevada's 17 elected district attorneys, all city attorneys engaged in the prosecution of criminal cases, and all deputy attorneys employed by these officials.

The Nevada District Attorneys Association is a voluntary, unincorporated association of district attorneys that works with legislatures, courts and local policymakers to ensure that the interests of prosecutors are appropriately represented. The Nevada District Attorneys Association also works to educate prosecutors in the area of prosecutorial training and ethics.

This case raises matters of concern to prosecutors in the 9th Circuit and throughout the country. The rule enunciated by the 9th Circuit conflicts with the rulings from other Circuits, and will lead to civil litigation and potential civil liability for acts by

prosecutors that are necessarily a part of the prosecutorial function, and thus under the authority of this Court have been entitled to absolute immunity from civil liability under 42 U.S.C. § 1983. *Amici* represent the interests of prosecutors on these issues.

BACKGROUND

Respondent/plaintiff Goldstein (appellee below) filed suit in the United States District Court for the Central District of California under 42 U.S.C. § 1983 for a violation of his civil rights. He alleged that petitioners/defendants John Van de Kamp and Curt Livesay (appellants below), as the elected District Attorney and Chief Deputy District Attorney of Los Angeles County, should be held liable for failing to institute procedures to allow deputy district attorneys to access information about benefits received by "jail house informants," for failing to train deputy district attorneys to disseminate such information, for thereby creating an administrative policy and practice of encouraging the use of fabricated confessions, and for failing to install a system to disseminate to deputy district attorneys and to defendants information which would impeach jail house informants.

Petitioners moved to dismiss, contending they are entitled to absolute immunity for these alleged failings, under the doctrine of prosecutorial immunity enunciated by this Court in *Imbler v. Pachtman*, 424 U.S. 409 (1976). Respondent Goldstein contended

that Van de Kamp and Livesay are not entitled to absolute immunity because the challenged acts and inactions were administrative, rather than prosecutorial, in nature. The District Court agreed with Goldstein and denied the motion to dismiss. On appeal, a three judge panel of the 9th Circuit Court of Appeals affirmed the ruling of the District Court (481 F.3d 1170). Motions for a rehearing and hearing en banc were denied.

SUMMARY OF ARGUMENT

Under longstanding authority of this Court, prosecutors are afforded absolute immunity for official actions that are intimately associated with the judicial phase of the criminal process. The respondent (plaintiff) seeks to impose liability on petitioners John Van de Kamp and Curt Livesay, top level prosecutors, based on the theory that they failed to adopt policies and procedures related to disseminating information about jailhouse informants, and about evaluating and using jailhouse informants in criminal prosecutions, thereby leading to a violation of respondent's constitutional rights when a subordinate prosecutor used a jailhouse informant to prosecute respondent. Such alleged failings on the part of petitioners, insofar as they have any constitutional and civil rights dimension, necessarily involve official actions which are intimately associated with the prosecution function in the judicial process. Lower federal courts have split on the issue of management

liability for prosecution policy decisions, but substantial authority supports the position urged by petitioners and *amici*. Contrary authority relied on by the 9th Circuit is poorly reasoned, or has underpinnings not applicable to this case. Further, the rule adopted by the 9th Circuit here would lead to incongruous results, excusing intentional violations of civil rights by some prosecutors while finding liability for unintentional violations by supervising prosecutors.

ARGUMENT

This Court has applied a functional analysis to the activities of public prosecutors in deciding whether or not absolute immunity applies to a claim under section 1983. *Imbler*, supra, 424 U.S. at 430; *Burns v. Reed*, 500 U.S. 478, at 486-487 (1991); *Kalina v. Fletcher*, 522 U.S. 118, at 126-127 (1997). Absolute immunity applies to a prosecutor's activities that are "intimately associated with the judicial phase of a criminal process." *Imbler*, supra, 424 U.S. at 430. Applying such a functional analysis to the alleged failings of defendants/appellants Van de Kamp and Livesay, the conclusion is inevitable that the challenged practices and policies (or lack thereof) are entitled to absolute immunity.

In summary, Goldstein's claim is that Van de Kamp and Livesay failed to adopt and enforce policies and procedures that would ensure that information about benefits to jail house informants (which would

reflect on the informant's credibility, and therefore would be *Brady* material) would be transmitted to all deputy district attorneys and to defense counsel. This claim is thus that Van de Kamp and Livesay committed a *Brady/Giglio* violation.

Under *Brady v. Maryland*, 373 U.S. 83 (1963), the prosecution has a constitutional obligation to disclose to a criminal defendant material evidence that is favorable to the defendant. *Giglio v. United States*, 405 U.S. 150 (1972) extended the *Brady* rule to cover implied promises of leniency made to informant witnesses. *Giglio* further held that when such a promise is made to the informant by one prosecutor, the fact that a subsequent prosecutor has no personal knowledge of the promise does not relieve the government of the *Brady* obligation as to that information.

> The prosecutor's office is an entity and as such it is the spokesman for the Government. A promise made by one attorney must be attributed, for these purposes, to the Government. . . . To the extent this places a burden on the large prosecution offices, procedures and regulations can be established to carry that burden and to insure communication of all relevant information on each case to every lawyer who deals with it.

Giglio, supra, 405 U.S. at 154.

Thus, *Giglio* holds that the *Brady* obligation is not merely a personal obligation imposed on the individual prosecutor (though it is certainly that), it

is also an institutional obligation imposed on the prosecution office.

Courts have held the *Brady* obligation covers a variety of inducements to witnesses. See, e.g., *In re Jackson*, 3 Cal.4th 578, 593-597 (1992) (promises made to jailhouse informants held to be covered generally by *Brady*, but not material in that case; overruled as to materiality standard in *In re Sassounian*, 9 Cal.4th 535, 545, fn. 6 (1995)); *United States v. Bagley*, 473 U.S. 667, 676 (1985) (evidence that witnesses were paid for their testimony); *People v. Kasim*, 56 Cal.App.4th 1360 (1997) (promises or inducements to a witness in prior cases). In these cases, the evidence implicates *Brady* because it may impeach the credibility of the witness.

Evidence which impeaches the credibility of a witness may lead the prosecutor to decide not to rely on that witness (and thus either to prosecute the case without using the witness, or decline to prosecute the case altogether). If the prosecutor does prosecute the case using the witness, the defense may use the impeachment evidence at trial to undermine the testimony of the witness before the jury. Under any of these situations, the prosecutor deals with the impeachment evidence in intimate association with the judicial phase of the criminal process.

As noted above, Supreme Court authority holds that absolute immunity applies to a prosecutor's activities that are "intimately associated with the judicial phase of a criminal process." *Imbler*, supra,

424 U.S. at 430. In the case at bar, the alleged violation is an institutional failing of the *Brady/Giglio* obligation, with Van de Kamp and Livesay, as the head of the institution, being charged with liability. The key point is that a *Brady* violation *necessarily* occurs in intimate association with the judicial phase of the criminal process.

Brady imposes on the prosecution the "duty under the due process clause to insure that 'criminal trials are fair,'. . . ." *Weatherford v. Bursey*, 429 U.S. 545, at 559 (1977). However, the obligation must be balanced against the rule that a criminal defendant has no constitutional right to general discovery in a criminal case. *Id.* Thus, *Wardius v. Oregon*, 412 U.S. 470 at 474 (1973), states that "the Due Process Clause has little to say regarding the amount of discovery which the parties must be afforded." Because the right is one related to criminal trials, whether a *Brady* violation exists is measured by whether "the defendant is given impeachment material, even exculpatory impeachment material, *in time for use at trial*. . . ." *United States v. Presser*, 844 F.2d 1275, at 1283 (6th Cir. 1988) (emphasis added). Courts have held that disclosure of *Brady* material on the first day of trial may satisfy the due process requirement. *United States v. Wooley*, 9 F.3d 774, at 777 (9th Cir. 1993); *United States v. Koehler*, 266 F.3d 937, at 939 (8th Cir. 2001). Likewise, this Court has held that the prosecution need not disclose impeachment evidence before a defendant enters a guilty plea, as long as all evidence of the defendant's factual

innocence has been disclosed. *United States v. Ruiz*, 536 U.S. 622 (2002).

When the *Brady* obligation is viewed in this light, it is obvious that any policies or procedures designed to insure that *Brady* is satisfied necessarily are in intimate association with the judicial phase of the criminal process, within the meaning of *Imbler*. It is difficult to conceive how they could be otherwise. The policies, practices and training Goldstein would have Mr. Van de Kamp and Mr. Livesay put in place only have constitutional effect (and thus § 1983 effect) in the prosecution context, and indeed in the trial context.

It is established that even knowing use of false testimony at trial and suppression of exculpatory evidence represent conduct protected by absolute immunity. *Imbler*, supra, 424 U.S. at 431. Further, the 9th Circuit has held that supervising prosecutors who grant immunity to a witness in exchange for perjured testimony are protected by absolute immunity. *Genzler v. Longanbach*, 410 F.3d 630, at 643-644 (9th Cir. 2005). The 9th Circuit has also stated that for absolute immunity purposes,

> . . . there is "no meaningful distinction between a decision on prosecution in a single instance and decisions on prosecutions formulated as a policy for general application." *Haynesworth v. Miller*, 261 U.S.App.D.C. 66, 820 F.2d 1245, 1269 (D.C.Cir.1987.) "Both practices involve a balancing of myriad factors, including culpability, prosecutorial

> resources and public interests" and "both procedures culminate in initiation of criminal proceedings against particular defendants, and in each it is the individual prosecution that begats the asserted deprivation of constitutional rights." *Id.*

Roe v. City & County of San Francisco, 109 F.3d 578, at 583-584 (9th Cir. 1997)

Policies of general application regarding jailhouse informants and the dissemination of *Brady* material are subject to these same principles. Such policies will encompass identifying and balancing factors to be considered in application to the trial function of individual cases, such as:

- the relative levels of culpability of the defendant and the jailhouse informant;
- balancing the public benefit to be had in affording leniency to a criminal suspect who is also an informant weighed against the public detriment suffered from failing to hold that suspect/informant fully accountable for his crimes;
- the benefit to be gained through the testimony of the informant against another defendant;
- the nature of the informant benefits and whether or not they rise to the level of materiality;

- the documentation for dissemination and discovery purposes of any material benefits conferred;
- the prosecutorial resources allocated to determining what information different from benefits given to the informant is material enough to warrant inclusion in such a system;
- the means of documenting non-benefit information about informants (i.e. past testimony, past criminal record, etc.) which is deemed to be material;
- the prosecutorial resources allocated to creating some sort of system for recording, integrating, sharing and disseminating such information among prosecutors;
- the timing for the disclosure of such information to the defense.

These are but some of the factors that would go into the development of such policies and procedures. All of these factors are part of the balancing function prosecutors traditionally make assembling, evaluating and presenting a case in the judicial process. They are no less prosecutorial if they are compiled and designed for general application, put onto a piece of paper and placed in a binder marked "DA Policies and Procedures" – the test is a functional one. In this context, while the policy may be general, it is felt exclusively in the trial stage of individual cases. It has no constitutional impact outside of the trial context.

Other courts have held that supervising prosecuting attorneys are entitled to absolute immunity against allegations of inadequate training or policies regarding prosecutorial activities which are subject to absolute immunity when conducted by subordinate prosecutors. *Hamilton v. Daley*, 777 F.2d 1207, at 1213 (7th Cir. 1985) (holding that such claims were sufficiently meritless as to justify the awarding of attorneys fees); *Haynesworth v. Miller*, 820 F.2d 1245, at 1269 (D.C. Cir. 1987) (overruled in part on other grounds in *Hartman v. Moore*, 547 U.S. 250 (2006)); *Boddi v. Morgenthau*, 342 F.Supp. 193, at 205 (S.D.N.Y. 2004); *Pinaud v. County of Suffolk*, 798 F.Supp. 913 (E.D.N.Y. 1992), rev'd in part on other grounds, 52 F.3d 1139 (2d Cir. 1995). The 9th Circuit opinion gives no consideration to these authorities, nor any explanation why the reasoning of these cases is not sound.

The 9th Circuit panel relied on two cases from other circuits which conflict with the above authorities, *Carter v. City of Philadelphia*, 181 F.3d 339 (3d Cir. 1999) and *Walker v. New York*, 974 F.2d 293 (2d Cir. 1992). Neither those opinions themselves, nor the 9th Circuit's reliance on them, is convincing.

Carter v. City of Philadelphia, 181 F.3d 339 (3d Cir. 1999) involved a suit against both police and prosecutors for *Brady* and related violations. The prosecutors' liability in that case was based in part on the failure to institute policies that would have trained and discouraged *police* from soliciting perjured testimony. Without addressing the relationship between police and prosecutors in Philadelphia, Pennsylvania, the extension of

such a ruling to a California District Attorney would be wholly unwarranted.

In California, the District Attorney and the police agencies are separate and independent – neither has authority over the other. California District Attorneys are independent officials under the California Constitution, elected to the post. See generally, California Constitution, Article XI, § 1(b); California Government Code §§ 24000(a), 26500 through 26543. Police authority ordinarily resides with the Sheriff in unincorporated areas, and the city police department in incorporated cities. The Sheriff, like the District Attorney, is an independent elected county officer provided for by the California Constitution and by statute, with duties and authority separate from the District Attorney. California Constitution, Article XI, § 1(b); California Government Code §§ 26600 through 26770. Likewise, police departments, as a subdivision of a city, have their own status independent of the District Attorney. See California Constitution, Article XI, § 5(b); *Brown v. City of Berkeley*, 57 Cal.App.3d 223 (1976). The police department of a city is under the control of the chief of police, not the District Attorney. See California Government Code § 38630 as to general law cities; California Constitution, Article XI, § 5(b) as to charter cities; see also *Armas v. City of Oakland*, 135 Cal.App. 411 (1933).[2]

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[2] In California, cities are of two types – general law cities and charter cities.

The point is that in California, the District Attorney does not have administrative authority over either the Sheriff or the police. Whatever the relationship may be between the Philadelphia Police Department and the Philadelphia District Attorney, it would be wholly inappropriate to hold Mr. Van de Kamp and Mr. Livesay responsible for not adequately training an independent police agency over which they had no administrative authority. The reasoning of *Carter* is thus suspect as applied to this case.[3]

Carter can also be distinguished from the instant case by its analysis of the 11th Amendment issue in that case. The *Carter* court concluded that the District Attorney in Pennsylvania was not a state official for 11th Amendment purposes, analyzing and interpreting Pennsylvania law. In California, by contrast, definitive California Supreme Court authority holds that a California District Attorney is in fact a state official, not only in prosecuting cases, but also in establishing policy and training employees. *Pitts v. County of Kern*, 17 Cal.4th 340 (1998).

Walker v. New York, 974 F.2d 293 (2d Cir. 1992), is also suspect as authority for liability in this case. Neither *Walker* nor the earlier Second Circuit case on

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[3] This is to be distinguished from the prosecutor's involvement with the police in the investigative stage of the prosecution, which may lead to qualified immunity rather than absolute immunity (see *Burns v. Reed*, 500 U.S. 478, at 492-496 (1991)). But respondent Goldstein has not alleged here that Van de Kamp or Livesay participated in the investigation in such a manner that their actions entered the realm of qualified immunity.

which it relies, *Gentile v. County of Suffolk*, 926 F.2d 142 (2d Cir. 1991) has any discussion of *Imbler* or the line of cases distinguishing prosecutorial and administrative functions. Such paltry analysis hardly provides a sound basis for the liability decision concerning prosecutorial immunity that the 9th Circuit panel made here.

The 9th Circuit opinion also will lead to an incongruous result. Intentional violations in individual cases will be subject to absolute immunity for those individual prosecutors who deliberately intend to violate a criminal defendant's rights. However, supervising prosecutors such as Van de Kamp and Livesay, whose violation for failing to put policies and training in place can be characterized at most as negligent or perhaps done with willful disregard, rather than being an intentional violation of an individual defendant's rights, will not be entitled to absolute immunity for their policy decisions (or indecision) regarding some perceived or alleged failure to have adequate *Brady/Giglio* procedures and training in place. Indeed, under the 9th Circuit's formulation, virtually any prosecution action by a line prosecutor which would be entitled to absolute immunity could be transformed into potential liability for supervising or managing prosecutors, based on some alleged failure to enact proper or adequate policies or procedures. Such a result would greatly undermine the wise policy enunciated by *Imbler*.

CONCLUSION

The decisions of the District Court and the 9th Circuit are not well founded, in legal reasoning or supporting authority. If the rule they enunciate remains, it will lead to excess civil litigation which second guesses District Attorneys in the policy decisions they make, and the allocation of their efforts and resources in balancing case prosecution needs.

For the foregoing reasons, *amici* respectfully request that this Court grant a writ of certiorari in this case, and reverse the ruling of the 9th Circuit Court of Appeals.

Respectfully submitted,

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JOINT APPENDIX

98

No. 07-854

Supreme Court, U.S.
FILED
JUN 30 2008
OFFICE OF THE CLERK

In The
Supreme Court of the United States

JOHN VAN DE KAMP and CURT LIVESAY,

Petitioners,

v.

THOMAS LEE GOLDSTEIN,

Respondent.

On Writ Of Certiorari To The United States Court of Appeals For The Ninth Circuit

JOINT APPENDIX

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Petition For Writ Of Certiorari Filed December 19, 2007
Certiorari Granted April 14, 2008

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Date Filed	#	Docket Text
11/29/2004	1	COMPLAINT against defendants William Collette, Patrick Connolly, Ann Ingalls, Long Beach City of, Los Angeles County of, William MacLyman, John Henry Miller, Logan Wren.(Filing fee $ 150.) Jury Demanded., filed by plaintiff Thomas Lee Goldstein.(rrey,) (Entered: 12/06/2004)
		* * *
12/29/2005	71	SECOND AMENDED COMPLAINT against defendants Curt Livesay, John Van De Kamp, William MacLyman, Los Angeles County of, Long Beach City of, John Henry Miller, William Collette, Logan Wren amending Amended Complaint, [38] ,filed by plaintiff Thomas Lee Goldstein (yc,) (Entered: 01/06/2006)
		* * *

* Any typographical and/or incorrect punctuation found in the following Joint Appendix pages were intentionally left to show accurately how the original documents appeared.

02/01/2006 79 NOTICE OF MOTION AND MOTION of Defendants John Van De Kamp and Curt Livesay to Dismiss Second Amended Complaint, [71]; Memorandum of points and authorities filed by Defendants Curt Livesay, John Van De Kamp. Motion set for hearing on 3/6/2006 at 10:00 AM before Judge A. Howard Matz. (shb,) (Entered: 02/10/2006)

* * *

02/17/2006 80 OPPOSITION to MOTION to Dismiss by Defendants John Van De Kamp and Curt Livesay [79] filed by plaintiff Thomas Lee Goldstein. (jp,) (Entered: 02/24/2006)

02/27/2006 82 REPLY to OPPOSITION to MOTION to Dismiss Case re Amended Complaint, [71][79] filed by defendants Los Angeles County of, Curt Livesay, John Van De Kamp. (jag,) (Entered: 03/06/2006)

* * *

03/06/2006 83 MINUTES OF Motion Hearing held before Judge A. Howard Matz : Court circulates tentative order and hears oral argument. Court DENIES defendants John Van De Kamp and Curt Livesay's MOTION to Dismiss Case re Amended Complaint, [71][79] Court Reporter: Leslie A. King. (smo,) (Entered: 03/08/2006)

03/06/2006	84	MINUTES OF IN CHAMBERS ORDER by Judge A. Howard Matz : Defendants John Van de Kamp and Curt Livesay move under Federal Rule of Civil Procedure 12(b)(6) to dismiss Plaintiff Thomas Goldstein's Fifth Claim for Relief in his Second Amended Complaint. Van De Kamp was the District Attorney for the County of Los Angeles at the time Goldstein was prosecuted and convicted; Livesay was Van De Kamp's chief deputy. It is likely that Ninth Circuit will have to consider the line between "prosecutorial" and "administrative" conduct. Accordingly, dismissing Van De Kamp and Livesay from the case seems premature at this point. Defendants' motion to dismiss is DENIED. See document for details. (smo,) (Entered: 03/08/2006)
04/05/2006	85	NOTICE OF INTERLOCUTORY APPEAL/Representation Statement to 9th CCA filed by defendants Curt Livesay, John Van De Kamp. Appeal of Motion Hearing Minutes 83, Filed On: 03/06/06, Entered On: 03/08/06; In Chambers Order 84 Filed On: 03/06/06; Entered On: 03/08/06. Filing fee $255, Paid, receipt number 83941. cc: Steven D. Blades; Ronald O. Kaye; Monte H. Machit; Thomas J. Feeley; Michael

M. Peters; Peter J. Ferguson. (cbr,) (Entered: 04/07/2006)

* * *

04/19/2006 90 NOTIFICATION by Circuit Court of Appellate Docket Number 06-55537, 9th CCA regarding Appeal to Circuit Court, 85 filed by Curt Livesay, John Van De Kamp. (ghap,) (Entered: 04/19/2006)

* * *

05/12/2006 95 RECEIPT OF REPORTERS TRANSCRIPT of proceedings for the following dates: 03/06/06 Court Reporter: Leslie King (cbr,) (Entered: 05/25/2006)

05/12/2006 96 TRANSCRIPT filed for proceedings held on 03/06/06. Court Reporter: Leslie A. King. (cbr,) (Entered: 05/25/2006)

* * *

Relevant Docket Entries in the United States Court of Appeals for the Ninth Circuit in 06-55537, *Thomas Lee Goldstein v. John Van De Kamp and Curt Livesay*

04/17/2006	1	DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSEL. CADS SENT (Y/N): n. Setting schedule as follows: appellant's designation of RT is due 4/17/06, ; appellee's designation of RT is due 4/25/06; appellant shall order transcript by 5/5/06, ; court reporter shall file transcript in DC by 6/5/06; certificate of record shall be filed by 6/12/06 ; appellant's opening brief is due 7/24/06, ; appellees' brief is due 8/21/06; appellants' reply brief is due 9/5/06, ; [06-55537]
		* * *
05/01/2006	4	Filed Thomas Lee Goldstein in 06-55537 motion to expedite appeal served on 4/28/06 PROMO.
05/04/2006	6	Filed order (Deputy Clerk: tah) The aple's mtn to expedite is granted. The transcripts remains due 6/5/06. The opn brief is due 7/3/06. The ans brief is due 7/31/06. This case will be calendared as soon as possible. No tele extensions of time to file briefs will be granted pursuant to 9th Cir. R. 31-2.2(a). Written mtns for extensions are discouraged and

will not be granted absent a showing of extraordinary circumstances. [06-55537]

* * *

07/06/2006 9 Received Appellant John Van De Kamp in 06-55537, Appellant Curt Livesay in 06-55537's brief in 15 copies 20 pages (Informal: No) deficient late pending mtn with PROMO: notified counsel. Excerpts of record in 1 volumes. Served on 7/5/06 [06-55537]

07/06/2006 10 Filed Appellant John Van De Kamp in 06-55537, Appellant Curt Livesay in 06-55537's motion to file late the brief which was served on 7/5/06 PROMO [06-55537]

07/11/2006 12 Filed order (Deputy Clerk: tah) The aplt's mtn for leave to file the opn brief late is granted. The Clerk shall file the brief. The ans brief is due 8/4/06. The opt rpy brief is due 14 days after service of the ans brief . . . [06-55537]

07/11/2006 13 Filed original and 15 copies Aplts' opening brief (Informal: No) 20 pages and five excerpts of record served on 7/5/06 [06-55537]

* * *

07/17/2006 16 Filed certificate of record on appeal RT filed in DC 5/12/06. [06-55537]

08/07/2006	17	Filed original and 15 copies appellee Thomas Lee Goldstein in 06-55537's 21 pages brief, ; served on 8/4/06 [06-55537]
08/11/2006	19	Filed Appellant John Van De Kamp, Appellant Curt Livesay's motion to extend time to file reply brief until 8/25/06 [06-55537] served on 8/10/06 [5918572] PROMO [06-55537]
08/18/2006	21	Filed order (Deputy Clerk: tah) granting appellant's motion to extend time to file reply brief. Appellants' reply brief is now due 8/25/06, ; [06-55537]
08/29/2006	22	Received orig. 15 copies John Van De Kamp in 06-55537, Curt Livesay in 06-55537's reply brief (Informal: No) of 13 pages; served on 8/28/06 deficient late pending mtn with PROMO. [06-55537]
08/29/2006	23	Filed Aplts' motion to file late brief served on 8/28/06 PROMO. [06-55537]
		* * *
08/31/2006	26	Filed order (Deputy Clerk: tah) The aplts' mtn for leave to file thr rpy brief late is granted. The Clerk shall file the brief . . . [06-55537]
08/31/2006	27	Filed original and 15 copies Aplts' reply brief, (Informal: No) 13 pages; served on 8/28/06 [06-55537]

11/02/2006	30	FILED CERTIFIED RECORD ON APPEAL: 7 CLERK'S RECORDS, 3 TRANSCRIPTS, 1 BULKY DOCUMENT, & 1 SEALED ENVELOPE. [06-55537]
		* * *
01/23/2007	34	CALENDARED: Pasadena March 5, 2007 9:00 am Courtroom 3 [06-55537]
02/28/2007	37	Filed Thomas Lee Goldstein in 06-55537 additional citations, served on 2/26/07 PANEL. [06-55537]
03/05/2007	38	ARGUED AND SUBMITTED TO Robert R. BEEZER, Stephen R. REINHARDT, Thelton E. Henderson [06-55537]
03/28/2007	41	FILED OPINION: AFFIRMED (Terminated on the Merits after Oral Hearing; Affirmed; Written, Signed, Published. Robert R. BEEZER; Stephen R. REINHARDT; Thelton E. Henderson, author.) FILED AND ENTERED JUDGMENT. [06-55537]
04/03/2007	42	Received Steven J. Renick for Appellant Curt Livesay, Appellant John Van De Kamp, County of LA in 06-55537 letter dated 3/30/07 re: "typo error on page 3547 of court's decision." PANEL. [06-55537]

04/05/2007	43	Filed Appellant John Van De Kamp in 06-55537, Appellant Curt Livesay in 06-55537's motion to extend time to file petition for rehearing until 5/2/07 served on 4/4/07 PANEL. [06-55537]
04/06/2007	45	Filed Appellee Thomas Lee Goldstein notice of non-opposition to Aplt's mtn for extension of time fo file petition for rehearing served on 4/5/07 PANEL. [06-55537]
04/11/2007	46	Received Steven J. Renick for Appellant Curt Livesay, Appellant John Van De Kamp, County of LA in 06-55537 letter dated 4/11/07 re: withdrawing mtn for extension of time to file petition for rhearing by 5/2/07 and instead asking for 7 days extension to 4/18/07. PANEL. [06-55537]
04/11/2007	47	Filed order (Robert R. BEEZER, Stephen R. REINHARDT, Thelton E. Henderson,): Defendants-Appellants' withdrawal of their prior mtn for extension of time wihtin which to file a petition for rehearing and petition for rehearing en banc is noted. Their requet that they instead be given 7 days extension of time is granted. Defendants-Appellants shall have until 4/18/07 to file their petition for rehearing and petition for rehearing en banc. (phoned/faxed csls) [06-55537]

04/18/2007	48	Filed original and 50 copies Appellant John Van De Kamp in 06-55537, Appellant Curt Livesay in 06-55537 petition for panel rehearing and petition for rehearing en banc 22 p.pages, served on 4/18/07 PANEL, ACTIVE JUDGES AND ANY INTERESTED SENIOR JUDGES. [06-55537]
05/21/2007	50	Filed order (Robert R. BEEZER, Stephen R. REINHARDT, Thelton E. Henderson,): Plaintiff-Appellee shall file a response of no more than 15 (pages) to Defendants-Appellants' petition for rehearing en banc. 50 copies of said response shall be filed within 20 days of the date of this order. (phoned csl) [06-55537]
06/13/2007	51	Filed Appellee Thomas Lee Goldstein in 06-55537's response to petition opposing petition for en-banc rehearing served on 6/11/07 [06-55537]
06/18/2007	53	Filed Aplts' mtn for leave to file reply to opposition to Aplts' petition for panel rehearing and for rheearing en banc served on 6/16/07 PANE, ACTIVE JUDGES AND ANY INTERESTED SENIOR JUDGES. [06-55537]

06/18/2007 54 Received Appellant John Van De Kamp reply to response to petition for rehearing served on 6/16/07 (Defective: not allowed) served 6/16/07 PANEL, ACTIVE JUDGES AND ANY INTERESTED JUDGES. [06-55537]

06/19/2007 58 Filed original and 50 copies Appellate Committee in 06-55537's brief of 6 pages ;served on 6/18/07 PANEL, ACTIVE JUDGES AND ANY INTERESTED SENIOR JUDGES. [06-55537]

06/19/2007 59 Filed original and 0 copies NVPAC in 06-55537's brief of 2 pages in support for Aplt's petition for Rehearing ;served on 6/12/07 PANEL, ACTIVE JUDGES AND ANY INTERESTED JUDGES. [06-55537]

06/21/2007 61 Received Arthur E. Mallory for Amicus NDAA in 06-55537 letter dated 6/15/07 re: NDAA wish to join in am brief filed by the State of Nevada Advisory Council for Prosecuting Attorneys. PANEL, ACTIVE JUDGES AND ANY INTERESTED SENIOR JUDGES. [06-55537]

07/03/2007 64 Received Appellee Thomas Lee Goldstein's motion to strike amicus briefs in supp of pet for rhrg and, in alternative, for leave to file responsive memorandum . . . [06-55537] ; served on 6/28/07 [6222510] (insufficient copies of motion) PANEL

07/09/2007	66	Filed order (Stephen R. REINHARDT,): Because the amicus briefs described in Aple's mtn have already been filed and circularted to the Court in contravention of FRAP 29(a), it would serve little purpose to grant the mtn to strike at this time. Accordingly, the alternative mtn for leave to file a responsive memo and to perit supportive amicus briefs is granted submject to their being filed on/before 7/30/07 and subject to the amicus briefs containing a requst for permission to file to be presented to the panel prior to their filing. aple's responsive memo shall not exceed 15 pages in length and any amicus bries shall comply with the rules governing such briefs. (phoned csls) [06-55537]
07/13/2007	67	Received Thomas M. Robertson, President, National Association of Prosecutor Coordinators' letter dated 6/21/07 re: request the court to grant defendant/appellatns request for rehearing en banc. PANEL. [06-55537]
07/27/2007	68	Received Amicus ACLU,NCA in 06-55537's brief in 50 copies of 14 pages; deficient: TYPEFACE TOO SMALL, NO GREEN COVER; served on 7/27/07 Notified counsel to resned corrected brief and mtn. (COPY TO PANEL) [06-55537]

07/27/2007	69	Received Amicus ACLU,NCA in 06-55537's motion to become amicus curiae ; served on 7/27/07 (Typeface too small), Notified csl to refile. (COPY to PANEL). [06-55537]
07/30/2007	70	Filed Amicus ACLU,NCA in 06-55537's motion to become amicus curiae served on 7/30/07 PANEL, ALL ACTIVE JUDGES AND ANY INTERESTED SENIOR JUDGES.
07/30/2007	71	Received Amicus ACLU,NCA in 06-55537's brief in 50 copies of 13 pages; deficient: pending ruling on mtn to file am brief;served on 7/30/07 PANEL, ALL ACTIVE JUDGES AND ANY INTERESTED SENIOR JUDGES. [06-55537]
07/30/2007	72	Filed Appellee Thomas Lee Goldstein in 06-55537's response to Amicus Briefs filed in support of Petition for Panel Rehearing and for rehearing en banc served on 7/27/07 PANEL, ALL ACTIVE JUDGES AND ANY INTERESTED SENIOR JUDGES. [06-55537]
07/30/2007	73	Received Amicus Defender Organizat and The Innocence Network in 06-55537's brief in 50 copies of 19 pages; deficient: Pending rule on mtn to file amicus brief;served on 7/27/07 PANEL, ALL ACTIVE AND ANY INTERESTED SENIOR JUDGES. [06-55537]

07/30/2007	74	Filed Amicus Defender Organization and The Innocence Network in 06-55537's motion to become amicus curiae served on 7/27/07 PANEL, ACTIVE AND ANY INTERESTED SENIOR JUDGES.
09/20/2007	81	Filed order (Robert R. BEEZER, Stephen R. REINHARDT, Thelton E. Henderson,): denying petition rehearing and petition for for enbanc rehearing [6150428-1] [06-55537]
09/27/2007	82	MANDATE ISSUED [06-55537]

* * *

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

THOMAS LEE GOLDSTEIN, Plaintiff, vs. CITY OF LONG BEACH; JOHN HENRY MILLER in his individual and official capacity; WILLIAM COLLETTE in his individual and official capacity; LOGAN WREN, in his individual and official capacity; WILLIAM MacLYMAN, in his individual and official capacity; THE COUNTY	CASE NO. CV 04-9692-AHM (Ex) **SECOND AMENDED COMPLAINT FOR DAMAGES:** **(1) DEPRIVATION OF CIVIL RIGHTS, 42 U.S.C. § 1983;** **(2) CONSPIRACY TO INTERFERE WITH CIVIL RIGHTS, 42 U.S.C. § 1983;** **(3) DEPRIVATION OF CIVIL RIGHTS, 42 U.S.C. § 1983;**

OF LOS ANGELES; JOHN VAN DE KAMP in his individual capacity; CURT LIVESAY in his individual capacity; AND DOES 1-10, inclusive, Defendants.	) (4) DEPRIVATION OF CIVIL RIGHTS, 42 U.S.C. § 1983; (5) DEPRIVATION OF CIVIL RIGHTS, 42 U.S.C. § 1983; DEMAND FOR JURY TRIAL (Filed Dec. 29, 2005)	

I.

JURISDICTION AND VENUE

1. This action is brought by Plaintiff Thomas Lee Goldstein ("Plaintiff" or "Goldstein") pursuant to 42 U.S.C. § 1983.

2. This Court has jurisdiction under 28 U.S.C. §1343(4) for violations of the 1871 Civil Rights Enforcement Act, as amended, including 42 U.S.C. § 1983, and under 28 U.S.C. §1331.

3. The acts and omissions complained of commenced on November 16, 1979 and continued until April 2, 2004 within the Central District of California. Therefore, venue lies in this District pursuant to 28 U.S.C. § 1391.

II.

INTRODUCTION

4. On November 16, 1979 Long Beach Police officers arrested Plaintiff Thomas Lee Goldstein

without probable cause for a murder which he did not commit. Mr. Goldstein was convicted entirely on the perjured testimony of two witnesses suborned by the Long Beach Police officers. The prosecution's case was based on the false testimony of one eyewitness, who later testified under oath that he could never identify Mr. Goldstein, and a dishonest jailhouse informant who concocted a false "confession." Without this false evidence, Mr. Goldstein would not have been convicted.

5. Mr. Goldstein spent 24 years in prison as a result of the actions of the Long Beach Police officers. The officers' conduct in procuring the conviction of Mr. Goldstein violated his civil and constitutional rights and was felonious conduct under California Penal Code § 127. The Los Angeles County District Attorney's Office violated Mr. Goldstein's civil and constitutional rights by permitting the perjurious testimony of the jailhouse informant. As a result of these actions, Mr. Goldstein was deprived of the one thing all innocent people deserve: freedom.

6. After the Honorable Magistrate Judge Robert Block heard evidence of the officers' conduct, on December 27, 2002 the Honorable Dickran Tevrizian vacated the conviction and ordered that Mr. Goldstein be released if the prosecution did not file new charges. On December 4, 2003, the Ninth Circuit Court of Appeals affirmed the decision of the District Court and vacated Mr. Goldstein's conviction.

7. On December 15, 2003, the Ninth Circuit Court of Appeals issued a mandate ordering Mr. Goldstein's release from custody. In response to this order, attorneys from the Los Angeles County District Attorney's Office engaged in tactics designed to prevent Mr. Goldstein's release in defiance of the release order. These tactics included presenting to prison officials a purported "detainer." Using this "detainer," the attorneys unlawfully avoided judicial scrutiny, in violation of California law.

III.

PARTIES

8. Plaintiff Thomas Lee Goldstein is a resident of the State of California and resided within the jurisdiction of the State of California at all times herein alleged.

9. On information and belief, Defendant John Henry Miller is a resident of the State of Arizona. At times relevant herein, Defendant Miller was employed by and working on behalf of the Long Beach Police Department and resided within the jurisdiction of the State of California.

10. On information and belief, Defendant William Collette is a resident of the State of California. At times relevant herein, Defendant Collette was employed by and working on behalf of the Long Beach Police Department and resided within the jurisdiction of the State of California.

11. On information and belief, Defendant Logan Wren is a resident of the State of Arizona. At times relevant herein, Defendant Wren was employed by and working on behalf of the Long Beach Police Department and resided within the jurisdiction of the State of California.

12. On information and belief, Defendant William MacLyman is a resident of the State of Nevada. At times relevant herein, Defendant MacLyman was employed by and working on behalf of the Long Beach Police Department and resided within the jurisdiction of the State of California.

13. Defendant City of Long Beach is, and at all times herein alleged was, a municipal corporation or political subdivision, organized and existing under the laws of the State of California.

14. Defendant County of Los Angeles is, and at all times herein alleged was, a public entity, organized and existing under the laws of the State of California.

15. On information and belief, Defendant John Van De Kamp is a resident of the State of California. At times relevant herein, Defendant Van De Kamp was employed by and working on behalf of the Los Angeles County District Attorney's Office and resided within the jurisdiction of the State of California.

16. On information and belief, Defendant Curt Livesay is a resident of the State of California. At times relevant herein, Defendant Livesay was

employed by and working on behalf of the Los Angeles County District Attorney's Office and resided within the jurisdiction of the State of California.

17. Plaintiff is unaware of the true names and capacities of those Defendants sued herein as Doe Defendants. Plaintiff will amend this complaint to allege said Defendants' true names and capacities when that information becomes known to him. Plaintiff is informed, believes and thereon alleges that these Doe Defendants are legally responsible and liable for the incident, injuries and damages hereinafter set forth, and that each of said Defendants proximately caused the injuries and damages by reason of negligent, careless, deliberately indifferent, intentional, willful or wanton misconduct, including the negligent, careless, deliberately indifferent, intentional, willful or wanton misconduct in creating and otherwise causing the incidents, conditions and circumstances hereinafter set forth, or by reason of direct or imputed negligence or vicarious fault or breach of duty arising out of the matters herein alleged. Plaintiff will seek leave to amend this complaint to set forth said true names and identities of the unknown named Doe Defendants when they are ascertained.

IV.

GENERAL ALLEGATIONS

18. Plaintiff is informed and believes, and thereon alleges that, at all times herein mentioned,

each of the Defendants was the agent and/or employee and/or co-conspirator of each of the remaining Defendants, and in doing the things hereinafter alleged, was acting within the scope of such agency, employment and/or conspiracy and with the permission and consent of other co-Defendants.

19. Each paragraph of this complaint is expressly incorporated into each cause of action which is a part of this complaint and to any other cause of action which may be added to this complaint.

20. The acts and omissions of all Defendants were engaged in maliciously, callously, oppressively, wantonly, recklessly, and with deliberate indifference to the rights of Plaintiff.

V.

FACTUAL ALLEGATIONS

A. BACKGROUND

21. At the time of the murder, Mr. Goldstein was a 30 year old Caucasian man living in the City of Long Beach. He was a veteran who was honorably discharged from the United States Marine Corps. He was attending Long Beach City College studying engineering. He had no criminal convictions. He had no history of violence. There was no evidence that Mr. Goldstein ever owned or used a firearm, other than during his service with the United States Marine Corps.

22. Mr. Goldstein served much of his 24 four years in custody in various maximum security prisons before his conviction was reversed. He was released from prison on April 2, 2004. During those 24 long years, Mr. Goldstein suffered the unimaginable horrors of life in maximum security prisons. He was assaulted by other inmates. Due to his Jewish ethnicity, he was subjected to harassment and discrimination by other inmates. He was unable to pursue his profession or create a family.

23. Throughout the 24 years in custody, Mr. Goldstein relentlessly tried to prove his innocence. In pursuit of relief, he filed numerous petitions for writ of habeas corpus. He wrote countless letters emphasizing his innocence. These included letters to the Governor of California, to the California Attorney General's Office, to the Attorney General of the United States, to the United States Attorney of the Central District of California, to the California Board of Prison Terms, to the Long Beach Police Department, and to the Los Angeles County Public Defender's Office.

24. Mr. Goldstein never has wavered from proclaiming his innocence. From the beginning of his case to his release, he adamantly refused to accept any plea bargain. After Mr. Goldstein's writ of habeas corpus was granted in December of 2003, the Los Angeles County District Attorney's Office offered to dismiss the murder charge in exchange for a plea of manslaughter, which if accepted, would have secured his immediate release from custody. Mr. Goldstein

rejected that offer. Mr. Goldstein would not admit to a crime he did not commit, even if it would guarantee his release. Even after 24 years in custody, he risked a re-trial which could have resulted in a life sentence in prison. He is innocent of any crime.

B. PRE-ARREST INVESTIGATION

25. On November 3, 1979, at approximately 10:20 p.m., John McGinest, a 25 year old African American, was killed by four shotgun blasts. The police found the body of Mr. McGinest lying near the intersection of 12th Street and Pine Avenue in the City of Long Beach. There were four shotgun shells found in the vicinity of the body.

26. Mr. McGinest's car was found parked on the east side of Pine just north of 12th Street, several blocks away from Mr. Goldstein's residence. Mr. McGinest did not live in the neighborhood where he was murdered.

27. No one acquainted with the victim, John McGinest, ever testified or spoke to the police about anything that would suggest that the victim and Mr. Goldstein ever had any contact.

28. There was no forensic evidence – fingerprints, DNA, hair samples, fibers, bloody footprints or hand prints, etc. – linking Mr. Goldstein to this murder. There was no physical evidence – no clothes, no blood, no money, and no murder weapon – linking Mr. Goldstein to the offense.

29. After the murder, police officers from the Long Beach Police Department interviewed several eyewitnesses. Of the five eyewitnesses interviewed, all said the perpetrator was male. Three said the perpetrator was Hispanic or Mexican or African American, and two said he was Caucasian. Of the two that said described the perpetrator as Caucasian, one said he was 5'10" and 165-170 pounds, and the other said he was 5'10" and well built. None of the witnesses described the perpetrator as wearing eyeglasses.

30. Thomas Goldstein was nearsighted at the time of the incident and had worn eyeglasses since he was 13 years old, particularly at night. At the time of the trial, Mr. Goldstein was of slight build, 5'7½" and 135-140 pounds, substantially different from the build of the assailant as described by the two eyewitnesses who said that the perpetrator was Caucasian.

31. Witness Kay Shapiro claimed that she was awakened by a loud bang one week after the incident, on November 10, 1979, at approximately 2:00 a.m. She claimed she looked out her window and saw a man standing in the alley across the street from her apartment shooting a gun into the air. Other than Ms. Shapiro's testimony, there was no evidence that any such shooting occurred. Neither Ms. Shapiro nor any other person called the police about the shooting.

32. After firing the shots, Ms. Shapiro believed the man entered a residence down an alley across the street from her apartment. The estimated distance

from Ms. Shapiro's apartment to the man standing in front of the residence was 140 feet.

33. Ms. Shapiro also stated that she saw a man running down the alley on the night of the murder, November 3, 1979. Ms. Shapiro could not identify the man she allegedly saw on November 3, 1979. Nor could she identify the man she allegedly saw on November 10, 1979 as the same person she saw running on November 3, 1979. She never identified Mr. Goldstein as being the person she saw on either November 3, 1979 or November 10, 1979.

34. After the police interviewed Kay Shapiro, on November 14, 1979, Defendant Miller interviewed Kate Meighan, the manager of the apartment complex which Ms. Shapiro had identified. Ms. Meighan stated that the residence was rented by Mr. Goldstein.

35. On the night of the murder, Kate Meighan heard the shots and saw the perpetrator. When questioned, she described the perpetrator as a male African American, six feet tall, medium build, bushy hair wearing a horizontal striped shirt with beige shorts. She did not identify Mr. Goldstein as the perpetrator. Kate Meighan knew Mr. Goldstein, because she rented him his residence.

36. After Defendant John Henry Miller interviewed Kay Shapiro and Kate Meighan, on November 15, 1979 Defendant Miller contacted eyewitness Loran Campbell to view photographs of potential suspects. Mr. Goldstein's photograph was one of the photographs shown to Mr. Campbell. Also present

when the photographs were being shown to Loran Campbell was Defendant William MacLyman of the Long Beach Police Department.

37. When members of the Long Beach Police Department, including Defendants Detectives Miller and MacLyman, showed Mr. Campbell the photographs of suspects, Mr. Campbell looked at the photographs once or twice, but did not recognize anyone from the group of photographs. In response, one of the Defendant police officers selected Mr. Goldstein's photograph from the group and asked Mr. Campbell if the person in the photograph could have been the person he saw running on the night of November 3, 1979. Mr. Campbell stated that it was possible, but he was not sure. One of the Defendant police officers told Mr. Campbell that Mr. Goldstein *was the suspect* for the murder.

38. Although Loran Campbell could not recognize anyone out of the group of photographs, Defendant Detective John Henry Miller wrote in a November 16, 1979 police report that Mr. Campbell selected Mr. Goldstein's photograph and that Mr. Campbell stated: "That looks like the man. I'm not sure and I'm not positive but that looks like him." This statement written by Defendant Miller was fabricated and false.

39. While showing witness Campbell the photo of Mr. Goldstein, Defendant Miller, Defendant MacLyman and unknown Defendants Does 1-10 illegally, maliciously and recklessly influenced Mr. Campbell's

identification by pointing to Mr. Goldstein as the perpetrator of the crime. Then, Defendant Miller falsely and erroneously represented in his police report that Mr. Campbell had picked out Mr. Goldstein as the perpetrator of the crime. When either Defendant Miller, Defendant MacLyman or Does 1-10 chose Mr. Goldstein's photograph for Mr. Campbell's identification and then falsely reported that Mr. Campbell had selected Mr. Goldstein's photograph on his own, Defendant Miller, Defendant MacLyman and other Defendants of the Long Beach Police Department had the intention of causing the witness to erroneously conclude and say that Plaintiff was the murderer, and to cause the Los Angeles County District Attorney's Office to prosecute Mr. Goldstein.

40. Defendant Miller, MacLyman or Does 1-10 strongly and illegally influenced Mr. Campbell's identification by providing him with false and misleading information. Each of these representations was demonstrably false. Defendant Miller, Defendant MacLyman or Does 1-10 knew that their representations to Mr. Campbell were false, were made with the intention of causing Mr. Campbell to erroneously conclude and say that Mr. Goldstein was the murderer, and were made with the intention that the Los Angeles District Attorney's Office would rely on this false evidence to prosecute Mr. Goldstein.

41. On November 16, 1979, Mr. Goldstein was taken into custody by Defendant Detective John Henry Miller and Defendant Detective William MacLyman. Although a full consensual search of

Mr. Goldstein's residence occurred, the search revealed no clothes, no blood, no murder weapon, no ammunition, no evidence whatsoever linking Mr. Goldstein to the offense.

42. After taking Mr. Goldstein to the Long Beach Police station, Long Beach Police officers arrested him. The Long Beach Police officers had no probable cause to arrest Mr. Goldstein. Neither Mr. Campbell, nor any other eyewitness, could identify Mr. Goldstein as the person who committed the murder on November 3, 1979. In fact, all of the eyewitness, including Ms. Meighan who knew Mr. Goldstein, gave a description which was dissimilar to Mr. Goldstein. Uncorroborated evidence that a man shot a firearm in the alley next to Mr. Goldstein's residence a week after the murder did not meet the legal standard of probable cause to arrest Mr. Goldstein.

C. POST ARREST - THE CREATION OF A FALSE CONFESSION THROUGH THE JAILHOUSE INFORMANT

43. Mr. Goldstein was placed in custody at the Long Beach City Jail on November 16, 1979. He roomed in a cell with three other men, all Caucasian, on the evenings on November 16, 1979 and November 17, 1979. To every person he spoke with at the Long Beach City Jail about his case, he described what the police had informed him about his case. To every person he spoke to about his case, he informed them that he was innocent of the crime.

44. At the time of Mr. Goldstein's arrest, the prosecution had no witnesses connecting him to the victim, John McGinest. Even with Loran Campbell's false and fabricated identification, it was a very weak eyewitness case. In fact, the district attorney's notes on the case state: "Note: this case was filed in great haste. Filing officers assure me that it will get stronger."

45. Edward Floyd Fink was arrested on November 18, 1979 and placed into the Long Beach City Jail. Fink, a life-long heroin addict, had used heroin the day he was arrested. He was under the influence of heroin while incarcerated with Mr. Goldstein. Fink had been arrested many times in Long Beach prior to the trial. He also had been convicted of several felonies.

46. Fink approached Mr. Goldstein during Fink's first day in custody, November 18, 1979, and asked if he could bunk with him. Mr. Goldstein's cell was full the night before, but Fink ousted the fourth inmate and he had to find another cell when Fink took his place.

47. According to Fink, Mr. Goldstein told him that on the night of the murder, Mr. McGinest and Mr. Goldstein allegedly argued over money Mr. McGinest allegedly owed Mr. Goldstein. Other than Fink's testimony, there was no evidence that Mr. Goldstein ever had any contact with Mr. McGinest, let alone that he owed him money or had any motive to harm him.

48. Fink had a preexisting relationship with the Long Beach Police Department and had exchanged alleged "confessions" of Defendants for benefits before. The morning after meeting Mr. Goldstein, on November 19, 1979, Fink contacted Defendant Detective Logan Wren of the Long Beach Police Department and asked him who was handling the Goldstein case. Fink claimed to have contacted Defendant Detective Wren from the "day room" of the Long Beach City Jail. Fink claimed to have information to give to the police about the murder. Later on the afternoon of November 19, 1979, Fink spoke to Defendants Detective Logan Wren and Detective William Collette.

49. Even though Fink claimed that he allegedly learned incriminating information from Mr. Goldstein on November 18, 1979, his first night bunking with Mr. Goldstein, Defendants Collette and Wren failed to take notes or write a report of the November 19, 1979 meeting. Defendants Collette and Wren also failed to tape record Fink's statements during that meeting.

50. On information and belief, Defendants, officers of the Long Beach Police Department, purposely placed Fink in Mr. Goldstein's cell because there was no evidence linking Mr. Goldstein to the murder victim, Mr. McGinest. After Fink met with Defendants Wren and Collette on November 19, 1979 and learned about the case, he was interviewed a second day, November 20, 1979. This time the officers tape recorded Fink. On information and belief, Defendants, officers from the Long Beach

Police Department, conspired with Fink to create and memorialize Fink's concocted "confession," knowing that the "confession" Fink described on the tape recording did not come from Mr. Goldstein.

51. On information and belief, Defendants City of Long Beach and Defendants Long Beach Police officers Miller, Collette, Wren and MacLyman had a custom and practice prior to and subsequent to this case of working with jailhouse informants to create false confessions against criminal defendants, particularly those charged with homicide.

52. Fink created the "confession" of Mr. Goldstein; Mr. Goldstein never made such statements to Fink. With no confession and no eyewitness, there was no probable cause to charge Mr. Goldstein with the murder.

53. On information and belief, Defendants Long Beach police officers, and Defendants Does 1-10, together with Fink, fabricated a false "confession" and wrongfully attributed that false "confession" to Mr. Goldstein.

D. SUPERIOR COURT PROCEEDINGS

54. On November 21, 1979, Defendant Detective William Collette signed an affidavit for a Felony Complaint against Mr. Goldstein alleging that he murdered John McGinest. On information and belief, Defendant Collette provided to the Deputy District Attorney and to the court the false and fabricated

evidence stemming from the interviews of Mr. Campbell and Fink. Without knowledge of the corruption of Mr. Campbell's eyewitness identification by officers of the Long Beach Police Department, and of the falsity of Fink's statement and his unreliability, the Deputy District Attorney relied on the false and fabricated evidence, pursued the prosecution, and based on the presentation of this false evidence, the superior court found that the evidence constituted probable cause and issued the Felony Complaint.

55. At the preliminary hearing and at trial, the only witness to identify Mr. Goldstein as the perpetrator was Loran Campbell. The only witness to testify that there was an link between Mr. Goldstein and the victim, Mr. McGinest, was Fink.

56. Either before the preliminary hearing or before trial, a police officer assigned to Mr. Goldstein's case told Mr. Campbell that Mr. Goldstein had been identified by another witness and that Mr. Goldstein had failed a lie detector test. Both statements were untrue. The police officer also told Mr. Campbell that they felt that Mr. Goldstein definitely committed the crime. Finally, the police told Mr. Campbell that Mr. Goldstein had been to Las Vegas and spent a lot of money – apparently trying to link Mr. Goldstein to the money allegedly stolen from the victim, Mr. McGinest. Defendant, a member of the Long Beach Police Department, knew that his statements were false, and made the statements recklessly and maliciously with the intention of

causing Mr. Campbell to erroneously conclude and say that Mr. Goldstein was the murderer.

57. Mr. Campbell explained under oath at the 2002 evidentiary hearing on Mr. Goldstein's Petition for Writ of Habeas Corpus that he could not recognize Mr. Goldstein in the courtroom during the trial as the person who he saw on November 3, 1979. Mr. Campbell also explained at the evidentiary hearing that while he was testifying at Mr. Goldstein's trial, he picked out Mr. Goldstein based on where Mr. Goldstein was sitting in the courtroom.

58. Mr. Campbell further explained at the 2002 evidentiary hearing why he had testified in the 1979 preliminary hearing and the 1980 trial that Mr. Goldstein was the person he had seen running by his house on the night of the murder. Mr. Campbell explained that he was "a little overanxious to help out" the police. He chose Mr. Goldstein based on what the police had told him, his desire to be a good citizen and to help out law enforcement, but it was not based on his eye-witnessing the events of November 3, 1979. He testified that he believed the police had done a good investigation and he wanted to assist them.

59. Mr. Campbell testified at the evidentiary hearing that he was "intimidated" by the police because of their status as police officers, and therefore, was too embarrassed to mention in the courtroom during the trial or the preliminary hearing that the officers had picked out the photograph of Mr. Goldstein for him. He was afraid to testify truthfully

at the preliminary hearing and the trial about the police officer's selection of Mr. Goldstein at the photo-spread lineup.

60. Besides Mr. Campbell, five other eyewitnesses testified at trial that they saw the perpetrator commit the offense. Four of the six testified that the perpetrator was either African American, Hispanic or Hawaiian.

61. Ms. Kate Meighan testified that she watched the perpetrator for 7-8 seconds and got a good look at the perpetrator's entire face. The individual had an "Afro hairdo," which was bushy. She believed the perpetrator was Black, based upon his hair style and his complexion, and described him as a "fair skinned Negro." Ms. Meighan described the man as 5'11", about as tall as her husband. Ms. Meighan saw the perpetrator's entire face because he kept turning around. She had seen Mr. Goldstein several times before that night and she did not identify Mr. Goldstein as the murderer.

62. William Gail was approximately 50 feet away from the incident when the perpetrator shot the victim. Mr. Gail believed the man was either Mexican or Black and that his hair was in a bushy Afro. The perpetrator had a white coat on, so it was very clear that he had dark skin. When shown the photograph of Mr. Goldstein, Mr. Gail testified that his complexion was not the same as the perpetrator's complexion.

63. At trial, Fink testified that Mr. Goldstein confessed to him that on the night of the murder, Mr. McGinest and Mr. Goldstein allegedly had an argument over money. Fink initially testified that Mr. Goldstein did not state how much money Mr. McGinest owed him. He changed his testimony and said the amount was $1500, and again changed his testimony claiming that Mr. Goldstein did not say what the amount was.

64. Fink testified that Mr. Goldstein told him that he sold his shotgun a couple of days before he was arrested, which was over one week after the murder. There was no evidence that Mr. Goldstein ever owned a firearm, let alone a shotgun, or that any sale occurred. No one ever saw Mr. Goldstein with a shotgun.

65. At trial, Fink denied asking for a particular investigator about the Goldstein case. In contradiction to his trial testimony, Fink testified at his preliminary hearing that he specifically contacted Detective Wren on November 19, 1979, and then met with Detectives Wren and Collette at 1:00 p.m. on that day. Further, at trial, Fink admitted that he had given information to officers of the Long Beach Police Department on multiple occasions.

66. Nineteen year old Steven Borowski testified at trial that he shared the four person jail cell with Mr. Goldstein, Fink and a fourth inmate. Mr. Borowski met Mr. Goldstein on the November 16, 1979 in the Long Beach City Jail, Mr. Goldstein's first

night in custody, and spent a lot of time talking to him. Mr. Borowski was in custody for possession of hashish for sale. Mr. Borowski testified that Mr. Goldstein told him he did not know much about his own case, only what the police had told him – that some jogger was shot in the alley with a shotgun, and that the shooter ran away.

67. Mr. Borowski testified that he did not recall Mr. Goldstein ever stating where the shooting occurred, the name of the person who was shot, or his race. Mr. Borowski never heard Mr. Goldstein confess to the murder.

68. Mr. Borowski testified that Fink arrived a few days after Mr. Borowski started bunking in the same cell with Mr. Goldstein. Fink asked if he could join their cell, which had four persons the previous night, and consequently the fourth person was forced to move to another cell. Mr. Borowski recalled that on one of the nights when Fink was in their cell, all four cell-mates talked about their cases. He remembered Fink asking Mr. Goldstein about his case, and that Mr. Goldstein told Fink basically the same information that he already told Borowski. Mr. Goldstein told Mr. Borowski that this information came from the police. Mr. Borowski stated that he could hear the conversations in the cell.

69. Mr. Borowski testified that the following night there was no discussion between Mr. Goldstein and Fink, and that he never was awakened by any conversation. Specifically, Mr. Borowski stated that

he never heard Mr. Goldstein tell Fink that he had shot a man with a shotgun or that the person he shot owed him money.

70. Based on the false eyewitness testimony of Loran Campbell, tainted by the witness tampering by one of the Defendant Long Beach Police officers, and the false and fabricated confession by Fink, Mr. Goldstein was wrongfully held in custody. The remaining evidence at trial did not constitute probable cause against Mr. Goldstein.

E. FINK COMMITTED PERJURY AT TRIAL

71. Fink testified that he initially approached the police officers with information about Mr. Goldstein because it might benefit his own case. When defense counsel asked Fink whether he was receiving a benefit for testifying against Mr. Goldstein, Fink denied receiving such a benefit. Fink also testified that he had not previously received benefits for assisting law enforcement.

72. Fink's representation that he never received a benefit for cooperating with law enforcement in the past was untrue. For example, in a sentencing hearing on January 5, 1978, Fink was sentenced to the low term of 16 months in state prison for felony petty theft with a prior after the prosecutor urged the court to find mitigation due to Fink's "usefulness to law enforcement" in the past.

73. On information and belief, Fink had been acting as an informant for the Long Beach Police Department and had been receiving benefits for his assistance for approximately 10 years prior to his testimony in Mr. Goldstein's case.

74. Fink's representation that he was not benefitting from his testimony in the Goldstein case was untrue. When placed in the cell of Mr. Goldstein, Fink was charged with Grand Theft. On December 5, 1979, the prosecutor, Deputy District Attorney Kenneth Jeffers, set out the deal of a county jail sentence, not prison, and a maximum term of one year in custody on Fink's grand theft charge, rather than several years in custody which he normally would be facing based on his offense and his criminal history. The sentencing for Fink on that case was put off to December 17, 1979, the date Fink testified for the prosecution at Mr. Goldstein's preliminary hearing. Despite his lengthy criminal record, previous confinement in state prison for theft, and the fact that he was on parole at the time he committed the grand theft offense, on December 19, 1979, two days after he testified at Mr. Goldstein's preliminary hearing, Fink was sentenced to summary probation and 58 days in county jail. This was after Fink testified as an informant in the Long Beach Superior Court about another alleged jailhouse confession on December 13, 1979, in a different case, *People v. Whitaker*, where he stated that he was expecting to be sent to state prison for two to three years.

75. As part of his sentence, Fink was remanded into the custody of an officer of Defendant Long Beach Police Department, Detective Harry Kartinen. Fink admitted at Mr. Goldstein's trial that he previously provided information to Detective Kartinen at the Long Beach Police Department. Detective Collette also testified at Mr. Goldstein's trial that Fink is known to work with Detective Kartinen at Long Beach.

76. In addition, Fink received benefits in other cases because of his testimony at Mr. Goldstein's trial. After testifying against Mr. Goldstein at trial, Fink violated the terms of the summary probation sentence he received in Long Beach Superior Court on December 19, 1979. Consequently, in a supplemental report prepared by the Probation Department, Fink's understanding about some of the benefits of his cooperation was revealed: "[Mr. Fink stated] that the petty theft warrant in Orange County should have been dropped due to his testimony in a murder trial and that offense occurred prior to granting probation in the instant offense." Fink also wrote directly to the court explaining why an Orange County warrant should have been dropped based on his testimony in Mr. Goldstein's case, and that he was told, presumably by law enforcement, that it should be dropped.

77. Consistent with Fink's understanding, on January 2, 1980, the Orange County District Attorney's Office wrote a letter recommending that the charges underlying this warrant be dismissed, and

that there should be a correction of the record by the Orange County Municipal Court that the warrant had been recalled.

78. On information and belief, Defendants Long Beach police officers, and Defendants Does 1-10, knew that Fink was committing perjury on the witness stand when he failed to disclose the benefits he was receiving for testifying against Mr. Goldstein.

79. On information and belief, Defendants Long Beach police officers and Defendants Does 1-10, deliberately refrained from disclosing to the court, the Deputy District Attorneys prosecuting Mr. Goldstein and defense counsel that they knew that Fink was committing perjury when he testified that he was not receiving any benefits for testifying against Mr. Goldstein.

80. On information and belief, in failing to inform the court, the Deputy District Attorney and defense counsel, Defendants of the Long Beach Police Department and Defendants Does 1-10, intended to deceive the court, the Deputy District Attorneys prosecuting Mr. Goldstein, defense counsel and the jury, about Fink's credibility and the evidence against Mr. Goldstein, and/or acted in reckless disregard of the truth.

81. On information and belief, Defendants of the Long Beach Police Department, the City of Long Beach and Defendants Does 1-10, had a pattern and practice of using jailhouse informants to investigate criminal cases, conspiring with jailhouse informants

to create false and fabricated confessions of criminal defendants and of intentionally failing to disclose to the court, to the Deputy District Attorney and to defense counsel the benefits jailhouse informants received by confessions of criminal defendants.

F. AS THE RESULT OF THE LONG STANDING ADMINISTRATIVE POLICY, PRACTICE AND CUSTOM OF THE LOS ANGELES COUNTY DISTRICT ATTORNEY'S OFFICE, THE DEPUTY DISTRICT ATTORNEYS PROSECUTING MR. GOLDSTEIN WERE NOT AWARE OF THE BENEFITS FINK HAD RECEIVED FOR HIS TESTIMONY AGAINST MR. GOLDSTEIN

82. Attorneys from the Los Angeles County District Attorney's Office knew of the benefits Fink would receive for testifying against Mr. Goldstein as early as December 5, 1979, two weeks prior to Mr. Goldstein's preliminary hearing. During Fink's waiver of preliminary hearing on December 5, 1979, Deputy District Attorney Kenneth Jeffers assigned to Fink's Grand Theft Prosecution referred to an implicit bargain for Fink's testimony as a condition for the plea offer:

> You [Fink] understand, don't you, that we, or our office, would be able to approach the Judge at sometime *and tell him that things haven't worked out quite the way we thought and we don't think the Judge can go along*

with the County lid offer, if you know what I mean?

83. Also, written in the complaint information worksheet on Mr. Goldstein's case, Deputy District Attorney Kenneth Jeffers (initials "K.J.") noted on December 5, 1979, that Fink's defense attorney ("Kandell") "stated he would be willing to put the P & S [Plea and Sentencing] over on Fink's case until after Fink testifies on this [Goldstein's] case."

84. After Fink's December 5, 1979 court appearance, Deputy District Attorney Jeffers, following the policy, practice and custom of the Los Angeles County District Attorney's Office, failed to provide information with regard to the benefits Fink was promised and impeachment information to the Deputy District Attorneys handling Mr. Goldstein's case, and failed to disseminate such information regarding Fink in a manner that would inform all Deputy District Attorneys using Fink as an informant.

85. Then, on December 19, 1979, two days after Fink testified at Mr. Goldstein's preliminary hearing, and before his testimony in Mr. Goldstein's trial, Fink entered a felony guilty plea and received a sentence of three years summary probation and 58 days in the county jail. Fink was credited with 43 days already served. In addition to this reduction in sentence, all probation violations were taken off calendar, and Fink's underlying conviction never triggered a violation of his parole. Fink was discharged from parole in

January, 1980, prior to his testimony in Mr. Goldstein's trial. Deputy District Attorney Richard D. Howard, the Deputy District Attorney who represented the People at that sentencing hearing, offered Fink this plea bargain as consideration for Fink's cooperation in the Goldstein case.

86. After Fink's December 19, 1979 guilty plea and sentencing, Deputy District Attorney Richard D. Howard, following the policy, practice and custom of the Los Angeles County District Attorney's Office, failed to provide information with regard to the benefits Fink received and impeachment information to the Deputy District Attorneys handling Mr. Goldstein's case, and failed to disseminate such information regarding Fink in a manner that would inform all Deputy District Attorneys using Fink as an informant.

87. In 1972, approximately seven years prior to Mr. Goldstein's arrest, the United States Supreme Court decided *Giglio v. United States*, 405 U.S. 150, 154 (1972). In that decision, the Court held that:

> The prosecutor's office is an entity and as such it is the spokesman for the Government. A promise made by one attorney [to an informant witness] must be attributed, for these purposes, to the Government. [Citation omitted]. To the extent this places a burden on the large prosecution offices, procedures and regulations can be established to carry that burden and to insure communication of

all relevant information on each case to every lawyer who deals with it.

88. Prior, during and subsequent to the prosecution of Mr. Goldstein, the Los Angeles County District Attorney's Office knew of abuses concerning jailhouse informants and of its own failure to record or disseminate that knowledge.

89. In the late 1970's, prior to Mr. Goldstein's case, two prosecutorial agencies conducted inquiries into claims by a jailhouse informant that he knew of improper conduct by Los Angeles County District Attorney's Office personnel with regard to confessions allegedly made to a jailhouse informant. The record of the informant's activities and the conclusion of the inquiries was never indexed or widely distributed within the Los Angeles County District Attorney's Office, and subsequently the informant surfaced repeatedly as a witness in criminal trials.

90. On information and belief, in January of 1979, prior to Mr. Goldstein's trial, Defendant John Van De Kamp, the District Attorney for the County of Los Angeles, received letters from a jailhouse informant alleging that the informant and another informant provided false information in several criminal cases. This information was shared with Defendant Curt Livesay, and other representatives of the Los Angeles County District Attorney's Office. This information was never indexed or widely distributed within the Los Angeles County District Attorney's Office.

91. On information and belief, at the time of Mr. Goldstein's arrest on November 16, 1979, during his preliminary hearing held on December 17, 1979, and during his trial which began on April 15, 1980 and ended on April 25, 1980, Defendant John Van De Kamp was the District Attorney of the County of Los Angeles and Defendant Curt Livesay was the Chief Deputy of that office. As the District Attorney and Chief Deputy of the Los Angeles County District Attorney's Office, Defendant John Van De Kamp and Defendant Curt Livesay were the primary policy makers who would make the administrative decisions of that office. This included the training of Deputy District Attorneys throughout the office as a whole.

92. Despite the mandate by the United States Supreme Court in *Giglio v. United States*, 405 U.S. 150 (1972), in conjunction with the pervasive use of jailhouse informants within the County of Los Angeles and substantial notice that false testimony by informants had occurred repeatedly within the County of Los Angeles, Defendant John Van De Kamp, Defendant Curt Livesay and other representatives of the Los Angeles District Attorney's Office purposefully or with deliberate indifference failed to create any system for the Deputy District Attorneys handling criminal cases to access information pertaining to the benefits provided to jailhouse informants and other impeachment information, and failed to train Deputy District Attorneys to disseminate information pertaining to benefits provided to

jailhouse informants and other impeachment information.

93. On information and belief, prior to the prosecution of Mr. Goldstein, the administrators and policymakers of the Los Angeles County District Office, including Defendant John Van De Kamp and Defendant Curt Livesay, were aware that police officers and Deputy District Attorneys were providing case information orally and in writing to informants to make sure the informants knew the facts of the offense that a criminal defendant was charged with.

94. Prior to the prosecution of Mr. Goldstein, on information and belief, the administrators and policymakers of the Los Angeles County District Attorney's Office, including Defendant John Van De Kamp and Defendant Curt Livesay, considered the creation of a system to track the benefits provided to jailhouse informants and other impeachment information, but no such system was instituted.

95. In 1985, one Deputy District Attorney informed the Los Angeles County District Attorney's Investigative Bureau that jailhouse informant Leslie White had a reputation for unreliability, yet there was no investigation and no efforts to record or disseminate this information.

96. In 1986, a private investigator wrote a letter to representatives of the Los Angeles County District Attorney's Office addressing the issue of jailhouse informants being supplied copies of arrest reports and given prep sessions by investigators and prosecutors

to make sure that the jailhouse informants knew what the defendants had supposedly confessed to. The private investigator asserted that an investigation should be conducted, but he received no response.

97. On October 9, 1986, the Head Deputy of the Torrance branch of the Los Angeles County District Attorney's Office, Peter Berman, wrote to the Chief Deputy, Gilbert Garcetti, and to Director Bureau, Branch and Area Operations, Denis K. Petty, discussing the lack of accountability and lack of accurate information concerning jailhouse informants in the Los Angeles County District Attorney's Office, and the need for a standardized central index. The proposal was that through this index, every Deputy District Attorney should be required to log basic information in a standardized manner to give other Deputy District Attorneys access to jailhouse informant information.

98. On January 27, 1987, the Management Staff of the Los Angeles County District Attorney's Office met to discuss the creation of a central index reflecting jailhouse informants. The Management Staff of the Los Angeles County District Attorney's Office decided not to create a central index for informants. The reasons given were: a) the defense bar would find out about the informant's records which would be used to impeach the informant's credibility; and b) that the Management Staff suspected that deputies from the Los Angeles County Sheriff's Department intentionally put jailhouse informants in

jail cells with defendants from where law enforcement could use a confession. The Management Staff believed that deputies from the Los Angeles County Sheriff's Department would be charged with knowledge of the information in the centralized records and therefore, the future conduct of the jailhouse informant in obtaining confessions would be construed as possibility violating *Massiah v. United States*, 377 U.S. 201 (1964).

99. In October 24, 1988, informant Leslie White publicly demonstrated the methods jailhouse informants used to discover case information and to fabricate the accuseds' confessions.

100. On November 17, 1988, Chief Deputy District Attorney Gregory Thompson disseminated an order to all Criminal Deputy District Attorneys entitled Special Directive 88-14 stating:

> We must eliminate from the People's case the risk of perjured testimony by a jailhouse informant. That threat is most acute when the indication of the informant's reliability is solely that "he relates facts which are known to law enforcement, but could not otherwise be known by him." That factor of reliability has been shown not to be dependable in all cases. . .
>
> This office will no longer call as a witness a jailhouse informant to testify to a defendant's oral statement, admission or confession without concrete evidence of the truthfulness of the informant. . . Even then,

> prior approval by the appropriate Bureau Director must be obtained. . .

101. On June 1, 1989, Chief Deputy District Attorney Gregory Thompson disseminated another order to all Criminal Deputy District Attorneys entitled Special Directive 89-05 outlining the responsibilities of Deputy District Attorneys regarding jailhouse informants. In that order, Chief Deputy Thompson stated that the Los Angeles County District Attorney's will:

> establish a central jailhouse informant index to be maintained in the Bureau of Special Operations. This Central Index is available and indeed must be consulted by any attorney who wants to use a jailhouse informant as a witness.

102. In 1989-1990, the Los Angeles County Grand Jury reviewed evidence that the Los Angeles County District Attorney's Office and law enforcement throughout Southern California, including the City of Long Beach, were in the practice of using jailhouse informants to obtain false and fabricated confessions of criminal defendants. The pervasive use of these jailhouse informants put in doubt many of the convictions obtained by the Los Angeles County District Attorney's Office. The period of inquiry by the Grand Jury spans from approximately 1979 to 1990, although there are references to convictions as early as 1976.

103. In its findings in the *Report Of The 1989-90 Los Angeles County Grand Jury In Its Investigation Of The Involvement Of Jail House Informants In The Criminal Justice System In Los Angeles County*, the Grand Jury found that the Los Angeles County District Attorney's Office failed its responsibilities by its "deliberate and informed declination to take the action necessary to curtail the misuse of jail house informant testimony."

104. After the 1972 *Giglio* decision, the Los Angeles County District Attorney's Office, Defendant John Van De Kamp and Defendant Curt Livesay all had an administrative duty to create a system in which information pertaining jailhouse informants, including Fink, would be disseminated to Deputy District Attorneys Seifert and Browne, prosecutors who represented defendant County of Los Angeles during Mr. Goldstein's preliminary hearing and trial. Based on the administrative actions by Defendant John Van De Kamp and Defendant Curt Livesay, Deputy District Attorneys, including the Deputy District Attorneys on Mr. Goldstein's case, did not have access to any impeachment information including benefits provided to Fink prior to Mr. Goldstein's conviction.

105. Based on the Los Angeles County District Attorney's Office, Defendant John Van De Kamp's and Defendant Curt Livesay's failure to create a system in which information pertaining to jailhouse informants would be shared among Deputy District Attorneys, and the failure to train Deputy District

Attorneys to disseminate information pertaining to jailhouse informants, Deputy District Attorneys for Defendant Los Angeles County had a pattern and practice of permitting jailhouse informants to testify falsely at trial that they were receiving little or no benefits for their testimony, when in truth and fact, these informants were receiving extensive benefits for their testimony and they were committing perjury through such testimony.

106. Based on the Los Angeles County District Attorney's Office, Defendant John Van De Kamp's and Defendant Curt Livesay's failure to create a system in which information pertaining to jailhouse informants would be shared among Deputy District Attorneys, and their failure to train and supervise Deputy District Attorneys to disseminate information pertaining to jailhouse informants, Deputy District Attorneys for Defendant Los Angeles County had a pattern and practice of using unreliable testimony of jailhouse informants to secure criminal convictions, knowing that such testimony was false, or made in reckless disregard to the falsity of the informant's testimony.

G. MR. GOLDSTEIN'S PETITION FOR WRIT OF HABEAS CORPUS

107. On May 21, 2002, the United States District Court for the Central District of California held an evidentiary hearing with regard to Mr. Goldstein's Petition for Writ of Habeas Corpus. During that

bearing, Mr. Loran Campbell testified about his inability to pick out Mr. Goldstein's photograph; the false information which he received from Defendant Long Beach police officer with regard to Mr. Goldstein's culpability; and the intimidation he received from the officers.

108. Mr. Campbell was cross-examined by Deputy Attorney General William Davis at that evidentiary hearing.

109. After hearing Mr. Campbell's testimony in the federal evidentiary hearing, the Honorable Magistrate Robert Block found in the Report and Recommendation of United States Magistrate Judge, CV 98-5035-DT (RNB) *Thomas L. Goldstein v. G.E. Harris, Warden*,:

> Having listened to Campbell and observed his demeanor as he testified under oath at the Evidentiary Hearing, and having evaluated Campbell's Evidentiary Hearing testimony in light of the entire record of the state court proceeding, *the Court finds that Campbell's testimony was entirely credible*. Further, the Court finds that Campbell's recent account of the true circumstances of the photographic lineup and his identification of petitioner is not inconsistent with the record of the testimony that he offered at the preliminary hearing and trial in petitioner's case.

110. In addition to Mr. Campbell's testimony, Mr. Goldstein presented testimony and documentary

evidence pertaining to Fink's perjury during Mr. Goldstein's trial and the ongoing benefits he had been receiving for over ten years by assisting law enforcement. Mr. Goldstein also presented evidence of Fink's reputation in the community, including statements from Fink's friends and family, pertaining to Fink's reputation as a liar who would say anything to anyone in order to benefit himself.

111. At the hearing, Mr. Goldstein presented evidence through the Report of the 1989-1990 Los Angeles County Grand Jury, that the Los Angeles County District Attorney's Office and law enforcement, including the Long Beach Police Department, had engaged in a pattern and practice of working with dishonest jailhouse informants.

112. Fink's activity as a jailhouse informant in Los Angeles County falls squarely within the time frame described by the Los Angeles County Grand Jury. The Los Angeles County Grand Jury also describes the type of unscrupulous, dishonest conduct by jailhouse informants which was epitomized by the career of Fink with Southern California law enforcement.

113. With respect to Fink's testimony during Mr. Goldstein's trial, in the Report and Recommendation of United States Magistrate Judge, CV 98-5035-DT (RNB), the Honorable Magistrate Robert N. Block found Fink to have committed perjury during Mr. Goldstein's trial, and found that his testimony as a

whole was unreliable and in line with the findings of the Los Angeles County Grand Jury. In the Report, Magistrate Block further found that: "[I]t is readily apparent to this Court that Fink fits the profile of the dishonest jailhouse informant that the Grand Jury Report found to be highly active in Los Angeles County at the time of petitioner's conviction."

114. Based on the federal court's findings that Mr. Campbell's testimony was credible, such that he never could identify Mr. Goldstein and was forced into testifying against Mr. Goldstein by Defendants of the Long Beach Police Department, and that Fink's testimony was both unreliable and contained false statements, the lack of probable cause triggering Mr. Goldstein's arrest was confirmed.

115. On December 27, 2002, the Honorable Dickran Tevrizian, District Court Judge, adopted the findings of the Honorable Magistrate Robert N. Block. In doing so, the Court ordered:

> IT IS ORDERED that a conditional writ be granted as follows: Respondents shall release Petitioner from custody and discharge him from all adverse consequences of his conviction in Los Angeles County Superior Court Case No. A020746, unless Petitioner is brought to retrial within sixty (60) days of the date the Judgment herein becomes final, plus any additional delay authorized under State law.

H. MR. GOLDSTEIN WAS HELD IN CUSTODY IN CONTRAVENTION OF THE NINTH CIRCUIT COURT OF APPEALS' ORDER

116. After the issuance of this order by the District Court in the Central District of California, the State of California appealed this order to the Ninth Circuit Court of Appeals. On December 4, 2003, two days after oral argument by the parties, the Ninth Circuit Court of Appeals upheld the decision of the United States District Court for the Central District of California granting Mr. Goldstein's Writ of Habeas Corpus and reversing his conviction. In that decision, the Ninth Circuit ruled:

> We AFFIRM the district court's Order and Judgment of December 27, 2002 granting a conditional writ of habeas corpus to Thomas L. Goldstein and ORDER respondent to release petitioner Goldstein from custody. We further ORDER respondent to discharge Goldstein from all adverse consequences of his conviction in Los Angeles County Superior Court Case No. A020746, unless he is brought to retrial within sixty (60) days of the date of this Order, plus any additional delay authorized under State law, and that Goldstein be released from incarceration in the interim.

117. Even after the issuance of this order, Mr. Goldstein was not released from custody. On December 12, 2003, Mr. Goldstein filed a motion for immediate issuance of mandate; that same day the Ninth Circuit issued an order to show cause to the

Respondent in Mr. Goldstein's habeas petition that by 9:00 a.m. on December 15, 2003, why the mandate should not issue forthwith. On December 15, 2003, the Ninth Circuit granted Mr. Goldstein's motion to issue the mandate and Mr. Goldstein was to be released immediately from the custody of the California Department of Corrections.

118. On December 15, 2003, Deputy District Attorneys Connolly and Ingalls created a document typed on pleading paper which they named "ORDER FOR DETAINER pursuant to PENAL CODE SECTION 4755." The "Order for Detainer" stated:

> The Prosecution demands pursuant to Penal Code Section 4755 that the above named defendant be detained within the Department of Corrections for a period of five days from the signing of this order.

The "Order for Detainer" was then signed: "Pat Connolly."

119. On December 16, 2003, after faxing the detainer to the California Department of Corrections, Deputy District Attorney Connolly worked with officers of Defendant Long Beach Police Department to have Mr. Goldstein picked up and transported back to the custody of the Los Angeles County Sheriff's Department.

120. On December 17, 2003, Mr. Goldstein was transported by officers of Defendant Long Beach Police Department to the custody of the Los Angeles County Sheriff's Department.

121. In his Order Adopting Findings, Conclusions And Recommendations of the United States Magistrate Judge as Modified and Expanded, the Honorable Dickran Tevrizian did not hold the District Attorney's Office in contempt, but issued a strong reproof:

> The Court does not excuse or condone the conduct of the prosecutors in this case. Specifically, this Court condemns and censors Los Angeles County Deputy District Attorneys Patrick Connolly and Anne Ingalls in this case for their cavalier attitude, ethical amnesia, and questionable conduct in issuing a detainer that did not comply with California Penal Code § 4755 in that it was not a warrant to arrest. Said conduct employed by the prosecutors extended Mr. Goldstein's incarceration for as long as possible and then some.

I. THE DISTRICT ATTORNEY OF THE COUNTY OF LOS ANGELES' ATTEMPT TO FURTHER PROSECUTE MR. GOLDSTEIN AFTER THE MANDATE ORDERING HIS RELEASE WAS ISSUED ON DECEMBER 15, 2003

122. On December 17, 2003, Mr. Goldstein spoke with Deputy District Attorney Patrick Connolly and an officer of Long Beach Police Department. At that meeting, Mr. Goldstein asked Mr. Connolly when he was going to be released from custody since the Ninth Circuit ordered his release.

123. Without an arrest warrant and contrary to §§ 4755 and 1496 of the California Penal Code, Deputy District Attorney Patrick Connolly had Mr. Goldstein re-arraigned on the original murder charge the morning of December 18, 2003.

124. Shortly after the arraignment, Deputy District Attorney Patrick Connolly extended a plea offer to Mr. Goldstein to dismiss the murder charge in exchange for a plea to voluntary manslaughter with "time served," adding that Mr. Goldstein would be immediately released from custody upon entering the plea and being resentenced. Mr. Goldstein did not accept this offer.

125. On February 2, 2004, Mr. Goldstein appeared before Judge Arthur Jean, a Superior Court Judge in Long Beach, California and a former deputy district attorney in Long Beach at the time of Mr. Goldstein's arrest. Judge Jean dismissed Mr. Goldstein's case "in furtherance of justice" and cited the lack of evidence against Mr. Goldstein. Judge Jean threw out the case and emphasized its "cancerous nature." Judge Jean also concluded that the case against "Mr. Goldstein was prejudiced" at his original court proceedings "to such a degree that justice requires a new preliminary hearing." Judge Jean made no finding that there was probable cause to arrest or hold Mr. Goldstein.

126. Based on the District Court's findings in Mr. Goldstein's Petition for Writ of Habeas Corpus, the preliminary hearing testimony of Loran Campbell

an Fink were completely undermined. Without this testimony, there was no probable cause to detain Mr. Goldstein.

127. After the decision by Judge Arthur Jean, over twenty four years after the murder of John McGinest, Defendant Los Angeles County District Attorney's Office again, without probable cause, filed charges against Mr. Goldstein for the murder of Mr. McGinest.

128. On March 30, 2005, Long Beach Superior Court Judge James Pierce ruled that the prosecution could not use the previous trial testimony of Loran Campbell, who was now deceased.

129. On March 30, 2005, after hearing the testimony of Loran Campbell's stepson John Townzen, and the testimony of a Long Beach police officer proffering information from an interview of Campbell's ex-wife, Nellie Campbell, Long Beach Superior Court Judge James Pierce found that the testimony of these witnesses was not credible and ruled that such evidence would not be admitted at a preliminary hearing.

130. On April 2, 2004, Deputy District Attorney Patrick Connolly advised the court that Defendant Los Angeles County was unable to try Mr. Goldstein. Once again the case was dismissed.

131. From December 15, 2003, the date the Ninth Circuit Court of Appeals issued its mandate ordering the release of Mr. Goldstein, to April 2, 2004,

the date of Mr. Goldstein's release from custody, the County of Los Angeles wrongfully detained Mr. Goldstein without a judicial finding of probable cause.

132. When Mr. Goldstein was released from the custody of Defendant County of Los Angeles on April 2, 2004, he had been wrongfully and continuously held in custody since November 16, 1979, over 24 years.

FIRST CLAIM FOR RELIEF

DEPRIVATION OF CIVIL RIGHTS - 42 U.S.C. § 1983

(Against Defendants Miller, Collette, Wren, MacLyman and Does 1-10)

133. Plaintiff realleges paragraphs 1 through 132 as if fully set forth herein.

134. Defendants Miller, Collette, Wren, MacLyman and Does 1-10, while acting under color of law, deprived Plaintiff of his civil rights by violating his right under the Fourth Amendment to be free from unreasonable seizures and his right under the Fourteenth Amendment to due process of law in that they seized Plaintiff or caused Plaintiff to be seized, for approximately 24 years, without a warrant or probable cause to believe that he was involved in criminal activity, knowingly using false and fabricated evidence from Loran Campbell and Fink upon which to convict the Plaintiff.

135. Defendants Miller, Collette, Wren, MacLyman and Does 1-10 instigated a criminal prosecution against Plaintiff without probable cause and with malice, and maintained a code of silence during the pendency of the criminal proceedings and subsequent imprisonment knowing that the charges were false and that there was no credible evidence against Plaintiff.

136. The conviction against Plaintiff was reversed on December 4, 2003 and he was finally released on April 2, 2004. In being deprived of his personal freedom and liberty for a period of approximately 24 years, the harm suffered by Plaintiff was continuous in nature.

137. The above acts and omissions were done maliciously and recklessly in complete disregard of Mr. Goldstein's constitutional rights, with the intention that the Los Angeles County District Attorney's Office rely on this false and fabricated evidence in its prosecution of Mr. Goldstein. These actions were carried out under color of law, have no justification or excuse in law, and instead constitute a gross abuse of governmental authority and power, shock the conscience, are fundamentally unfair, arbitrary and oppressive, and unrelated to any activity which governmental officers may appropriately and legally undertake in the course of protecting persons or property, or ensuring civil order. The above acts and omissions were consciously chosen from among various alternatives.

138. Plaintiff has a right to be free from unreasonable seizures as protected by the Fourth Amendment, and a right to be free from the deprivation of his liberty without due process of law, as protected by the Fourteenth Amendment. Plaintiff has a liberty interest in being free from abusive governmental action and in being accorded procedural and substantive due process of law. All of these rights and privileges are secured to Plaintiff by the provisions of the Fourth Amendment and the Due process clause of the Fourteenth Amendment to the United States Constitution, and by 42 U.S.C. § 1983. All of these interests were implicated by the wrongful conduct of the Defendants Miller, Collette, Wren and MacLyman and Does 1-10 which proximately caused injuries and damages to Plaintiff, as herein alleged.

SECOND CLAIM FOR RELIEF

CONSPIRACY TO VIOLATE CIVIL RIGHTS - 42 U.S.C. § 1983

(Against Defendants Miller, Collette, Wren, MacLyman, and Does 1-10)

139. Plaintiff realleges paragraphs 1 through 132 as if fully set forth herein.

140. This claim for relief arises under the Fourth and Fourteenth Amendments to the Constitution of the United States, and under Title 42 of the United States Code, § 1983.

141. Defendants Miller, Collette, Wren, MacLyman and Does 1-10, acting under color of state law, conspired and agreed to deprive Plaintiff of rights, privileges, or immunities secured by the Constitution and laws of the United States, in particular the right to be free from unreasonable seizures as guaranteed by the Fourth Amendment to the United States Constitution, and the right to due process of law as guaranteed by the Fourteenth Amendment. These Defendants conspired to use false and fabricated evidence concerning Loran Campbell and Fink, in a malicious and reckless manner, with the intention that the Los Angeles County District Attorney's Office rely on this evidence in prosecuting Mr. Goldstein. In furtherance of this conspiracy, one or More of the Defendants committed one or more of the overt acts set forth elsewhere in this complaint, which did, in fact, deprive Plaintiff of his rights, privileges and immunities. As a direct and proximate result of Defendants' conspiracy and their overt acts in furtherance thereof, Plaintiff sustained injury and damage as proved.

142. Plaintiff is informed and believes, and thereon alleges, that the Defendants Miller, Collette, Wren, MacLyman and Does 1-10, and each of them, engaged in conduct that was independently illegal under state and federal law and that Defendants and each of them engaged in intentional, malicious and bad faith violations of his constitutional rights.

THIRD CLAIM FOR RELIEF

DEPRIVATION OF CIVIL RIGHTS – 42 U.S.C. § 1983

(Against Defendant City of Long Beach and Does 1-10)

143. Plaintiff realleges paragraphs 1 through 132 as if fully set forth herein.

144. Plaintiff is informed and believes and thereon alleges that, at all times herein mentioned, Defendants City of Long Beach and Does 1-10, with deliberate indifference, and conscious and reckless disregard to the safety, security and constitutional and statutory rights of Plaintiff, including the right to be free from unreasonable seizures under the Fourth Amendment and the right to due process of law under the Fourteenth Amendment, maintained, enforced, tolerated, ratified, permitted, acquiesced in, and/or applied *inter alia*, the following policies, practices and customs:

(a) failing to adequately train, supervise, and control its officers in the investigation and apprehension of suspects;

(b) failing to adequately train, supervise, and control its officers in the interviewing of witnesses and conducting photo identifications;

(c) failing to adequately train, supervise, and control its officers in working with jailhouse informants, with such conduct resulting in the use of false and fabricated testimony;

(d) failing to adequately discipline officers involved in dishonesty or otherwise abusing their authority;

(e) condoning and encouraging its officers in the belief that they can violate the rights of persons such as the Plaintiff in this action with impunity, and that such conduct will not adversely affect their opportunities for promotion and other employment benefits;

(f) failing to adequately investigate incidents involving the use of jailhouse informants or other misconduct by its officers;

(g) conducting investigations in such a manner as to conceal the misconduct of its officers; and/or

(h) condoning and encouraging the fabrication of evidence, including but not limited to the filing of materially false police reports, the use of perjurious jailhouse informants, and/or making false statements to prosecution authorities to obtain the filing of false charges and the institution of false and malicious prosecutions against victims of misconduct by its officers.

145. As a direct and proximate result of Defendant City, of Long Beach and Does 1-10 acts and omissions, condoning, encouraging, ratifying and deliberately ignoring the pattern and practice of Defendants Miller's, Collette's, Wren's and MacLyman's acts and omissions, Plaintiff sustained injury and damage as proved.

FOURTH CLAIM FOR RELIEF

DEPRIVATION OF CIVIL RIGHTS – 42 U.S.C. § 1983

(Against Defendant County of Los Angeles and Does 1-10)

146. Plaintiff realleges paragraphs 1 through 132 as if fully set forth herein.

147. Plaintiff is informed and believes and thereon alleges that, at all times herein mentioned, and for times prior and subsequent thereto, Defendant County of Los Angeles, through its office of the District Attorney, and Does 1-10, with deliberate indifference, and conscious and reckless disregard to the safety, security and constitutional and statutory rights of Plaintiff, including the right to be free from unreasonable seizures under the Fourth Amendment and the right to due process of law under the Fourteenth Amendment maintained, enforced, tolerated, permitted, acquiesced in, and ratified the administrative policy, practice and custom of failing to disseminate impeachment information, including the benefits jailhouse informants received in exchange for assistance in securing convictions against criminal defendants, and maintained, enforced, tolerated, permitted, acquiesced in, and ratified an administrative policy, practice and custom of using confessions obtained by the jailhouse informants which were false and fabricated.

148. On information and belief, Defendant County of Los Angeles and Does 1-10, knew that such

a policy and practice was likely to, and did, result in perjured testimony and wrongful convictions.

149. Defendant County of Los Angeles and Does 1-10, in their role as administrators of the Los Angeles County District Attorney's Office, failed to create a system and failed to train Deputy District Attorneys who handled jailhouse informants, to provide Deputy District Attorneys, including the Deputy District Attorneys who prosecuted Plaintiff, with information with regard to jailhouse informants, including the jailhouse informant who testified against Plaintiff, although required to do so by law. The impeachment information which the Los Angeles County District Attorney's Office failed to disseminate included the benefits the jailhouse informant was receiving for his cooperation against a criminal defendant, the jailhouse informant's history of cooperation with law enforcement, and other factors relating to the jailhouse informant's credibility. The administrators of Los Angeles County District Attorney's Office were aware of the obvious risks of not creating such a system and of not training Deputy District Attorneys to disseminate this impeachment information on jailhouse informants, and of the wrongful convictions that occurred as a result thereof. The administrators of the Los Angeles County District Attorney's Office purposely, or with deliberate indifference, failed to install such a system and failed to train Deputy District Attorneys to disseminate impeachment information including benefits with regard to jailhouse informants in order to prevent Deputy District

Attorneys, and criminal defendants, including Plaintiff, from having access to impeachment information with regard to jailhouse informants, including but not limited to the benefits each jailhouse informant had received.

150. As a direct and proximate result of Defendant's administrative policies, acts and omissions, Plaintiff sustained injury and damage as proved.

FIFTH CLAIM FOR RELIEF

DEPRIVATION OF CIVIL RIGHTS – 42 U.S.C. § 1983

(Against Defendants Van De Kamp, Livesay and Does 1-10)

151. Plaintiff realleges paragraphs 1 through 132 as if fully set forth herein.

152. On or about November 16, 1979, the day of Plaintiff's arrest, and continuing through April 25, 1980, the last day of Plaintiff's trial, Defendant John Van De Kamp, Defendant Curt Livesay, and Does 1-10, while acting under color of law at the District Attorney of the County of Los Angeles and the Chief Deputy of that office, deprived Plaintiff of his civil rights by violating his right under the Fourth Amendment to be free from unreasonable seizures and his right under the Fourteenth Amendment to due process of law in that, as the administrators and policymakers of the Los Angeles County District Attorney's Office, with deliberate indifference, and

conscious and reckless disregard to the safety, security and constitutional and statutory rights of Plaintiff, including the right to be free from unreasonable seizures under the Fourth Amendment and the right to due process of law under the Fourteenth Amendment maintained, enforced, tolerated, permitted, acquiesced in, and ratified the administrative policy, practice and custom of failing to disseminate impeachment information, including the benefits jailhouse informants received in exchange for assistance in securing convictions against criminal defendants, and maintained, enforced, tolerated, permitted, acquiesced in, and ratified an administrative policy, practice and custom of using confessions obtained by the jailhouse informants which were false and fabricated.

153. On information and belief, Defendant John Van De Kamp and Defendant Curt Livesay, knew that such a policy and practice was likely to, and did, result in perjured testimony and wrongful convictions.

154. Defendant John Van De Kamp, Defendant Curt Livesay and Does 1-10, in their role as administrators of the Los Angeles County District Attorney's Office, failed to create a system, failed to train and failed to supervise Deputy District Attorneys who handled jailhouse informants, to provide Deputy District Attorneys, including the Deputy District Attorneys who prosecuted Plaintiff, with information with regard to jailhouse informants, including the jailhouse informant who testified against Plaintiff,

although required to do so by law. The impeachment information which the Defendant John Van De Kamp and Defendant Curt Livesay failed to instruct representatives of the Los Angeles County District Attorney's Office to disseminate throughout the office included the benefits the jailhouse informant was receiving for his cooperation against a criminal defendant, the jailhouse informant's history of cooperation with law enforcement, and other factors relating to the jailhouse informant's credibility. Defendant John Van De Kamp and Defendant Curt Livesay, as the administrators and policymakers of the Los Angeles County District Attorney's Office, were aware of the obvious risks of not creating such a system and of not training Deputy District Attorneys to disseminate this impeachment information on jailhouse informants, and of the wrongful convictions that occurred as a result thereof. Defendant John Van De Kamp and Defendant Curt Livesay, as the administrators and policymakers of the Los Angeles County District Attorney's Office purposely, or with deliberate indifference, failed to install such a system and failed to train Deputy District Attorneys to disseminate impeachment information including benefits with regard to jailhouse informants in order to prevent Deputy District Attorneys, and criminal defendants, including Plaintiff, from having access to impeachment information with regard to jailhouse informants, including but not limited to the benefits each jailhouse informant had received.

155. As a direct and proximate result of Defendant's administrative policies, acts and omissions, Plaintiff sustained injury and damage as proved.

DAMAGES

156. As a direct and proximate result of the aforesaid acts, omissions, customs, practices, policies and decisions of the Defendants, Plaintiff has suffered great mental and physical pain, suffering, anguish, fright, nervousness, anxiety, shock, humiliation, indignity, embarrassment, harm to reputation, and apprehension, which have caused Plaintiff to sustain damages in a sum to be determined at trial.

157. Due to the acts of the Defendants, Plaintiff has suffered, and continues to suffer, and is likely to suffer in the future, extreme and severe mental anguish as well as mental and physical pain and injury. For such injury, Plaintiff will incur significant damages based on psychological and medical care.

158. As a further result of the conduct of each of these Defendants, Plaintiff has lost past and future earnings in an amount to be determined according to proof at trial.

159. As a further result of the conduct of each of these Defendants, Plaintiff has been deprived of familial relationships, including not being able to get married and raise a family.

160. All Defendants, except for Defendants City of Long Beach and County of Los Angeles, acted

outside the scope of their jurisdiction and without authorization of law, and, separately and in concert, the aforementioned acts of the Defendants, and each of them, was willful, wanton, malicious and oppressive, with reckless disregard or with deliberate indifference with the intent to deprive Plaintiff of his rights and privileges, and did in fact violate the aforementioned rights and privileges, entitling Plaintiff to exemplary and punitive damages in an amount to be proven at the trial of this matter.

161. By reason of the afore described acts and omissions of Defendants, Plaintiff was required to retain an attorney to institute and prosecute the within action, and to render legal assistance to Plaintiff that he might vindicate the loss and impairment of his rights, and by reason thereof, Plaintiff requests payment by Defendants of a reasonable sum for attorney's fees pursuant to 42 U.S.C. § 1988.

WHEREFORE, Plaintiff, Thomas Lee Goldstein, requests relief on his own behalf as follows, and according to proof, against each Defendant:

1. General and compensatory damages in an amount according to proof;

2. Special damages in an amount according to proof;

3. Exemplary and Punitive damages against each Defendant, except the City of Long Beach and the County of Los Angeles, in an amount according to proof;

4. Costs of suit, including attorneys' fees, under 42 U.S.C. §1988; and,

5. Such other relief as may be warranted or as is just and proper.

Respectfully submitted,

KAYE, McLANE &
BEDNARSKI, LLP

DATED: December 28, 2005

By: /s/ Ronald O. Kaye
RONALD O. KAYE
Attorneys for Plaintiff
Thomas Lee Goldstein

JURY DEMAND

Trial by jury of all issues is demanded.

KAYE, McLANE &
BEDNARSKI, LLP

DATED: December 28, 2005

By: /s/ Ronald O. Kaye
RONALD O. KAYE
Attorneys for Plaintiff
Thomas Lee Goldstein

PETITIONER'S BRIEF

98

No. 07-854

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In The
Supreme Court of the United States

JOHN VAN DE KAMP and CURT LIVESAY,

Petitioners,

v.

THOMAS LEE GOLDSTEIN,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF PETITIONERS

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QUESTIONS PRESENTED

1. Where absolute immunity shields an individual prosecutor's decisions regarding the disclosure of informant information in compliance with *Brady v. Maryland*, 373 U.S. 83 (1963) and *Giglio v. United States*, 405 U.S. 150 (1972) made in the course of preparing for the initiation of judicial proceedings or trial in any individual prosecution, may a plaintiff circumvent that immunity by suing one or more supervising prosecutors for purportedly improperly training, supervising, or setting policy with regard to the disclosure of such information for all cases prosecuted by his or her agency?

2. Are the decisions of a supervising prosecutor as chief advocate in directing policy concerning, and overseeing training and supervision of, individual prosecutors' compliance with *Brady v. Maryland*, 373 U.S. 83 (1963) and *Giglio v. United States*, 405 U.S. 150 (1972) in the course of preparing for the initiation of judicial proceedings or trial for all cases prosecuted by his or her agency, actions which are "intimately associated with the judicial phase of the criminal process" and hence shielded from liability under *Imbler v. Pachtman*, 424 U.S. 409, 430 (1976)?

PARTIES TO THE PROCEEDING

Petitioners (defendants and appellants below): John Van de Kamp and Curt Livesay.

Respondent (plaintiff and appellee below): Thomas Lee Goldstein.

Additional defendants below (not parties to the appellate proceedings): William Collette, City of Long Beach, California; Logan Wren; County of Los Angeles; William MacLyman; and John Henry Miller.

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The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 481 F.3d 1170 (9th Cir. 2007) and is reproduced in the Appendix to the Petition for Writ of Certiorari ("App.") at 1-15. The decision of the district court denying the petitioners' motion to dismiss and the order of the Court of Appeals denying the petition for rehearing and rejecting the suggestion for rehearing en banc are unpublished and reproduced in Appendix B (App. 16-21) and Appendix C (App. 22-23) to the Petition for Writ of Certiorari.

JURISDICTION

The United States Court of Appeals for the Ninth Circuit filed its opinion on March 28, 2007 and amended it on April 4, 2007 to correct a typographical error. The court denied the petitioners' petition for rehearing and rejected the suggestion for rehearing en banc on September 20, 2007. Petitioners timely filed a Petition for Writ of Certiorari in this Court on December 19, 2007 and jurisdiction is proper in this Court under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

Respondent brought the underlying action pursuant to 42 U.S.C. § 1983 which provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Respondent alleges that petitioners violated his rights under the Fourth and Fourteenth Amendments to the United States Constitution which provide, respectively as follows:

> ***Fourth Amendment:***
>
> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall

not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

***Fourteenth Amendment (Section 1)*:**

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

A. The Initial Complaint.

This action arose from plaintiff and respondent Thomas Goldstein's conviction for murder in 1980 – a conviction that was vacated on federal writ of habeas corpus after Mr. Goldstein served 23 years in prison. On November 29, 2004, Mr. Goldstein filed this action in the United States District Court for the Central District of California. Trial Record ("TR") 1.[1]

[1] References to the Trial Record denote the docket entry number assigned by the district court, with internal page citations of the original document.

The central allegation of the complaint was that plaintiff had been wrongfully arrested by Long Beach police officers based upon their engineering an improper eyewitness identification and then subsequently wrongfully convicted upon that improper evidence as well as the perjurious testimony of a jailhouse informant – Edward Fink. Fink testified that plaintiff had confessed the murder to him while the two were cellmates in jail. TR 1 at 14. Plaintiff further alleged that although Fink testified at trial that he had not received any benefit for cooperating in the prosecution, that in fact Fink received a lighter sentence in other criminal proceedings based upon his providing testimony. TR 1 at 16-17.

Named as defendants were the City of Long Beach and individual police officers and detectives, as well as the County of Los Angeles. TR 1 at 1. Plaintiff contended, *inter alia*, that the County maintained a policy, custom or practice of allowing its district attorneys to use perjurious jailhouse informants to testify at trial and failing to comply with this Court's decisions in *Brady v. Maryland*, 373 U.S. 83 (1963) and *Giglio v. United States*, 405 U.S. 150 (1972) mandating that a witness's receipt of a benefit for testifying be disclosed to a criminal defendant. TR 1 at 32-33; TR 14 at 19. Also named as defendants were two Los Angeles County Deputy District Attorneys whom plaintiff contended had improperly prolonged his custody by refiling criminal charges after the federal courts had granted his habeas corpus petition. TR 1 at 3, 33-34.

B. The Second Amended Complaint And Allegations Concerning Mr. Van de Kamp And Mr. Livesay.

On December 29, 2005, Mr. Goldstein filed a Second Amended Complaint, for the first time naming as defendants petitioners John Van de Kamp and Curt Livesay. Joint Appendix ("JA") 15; TR 71 at 38; Appellant's Excerpt of Record ("AER") 13. Mr. Van de Kamp was the Los Angeles County District Attorney, and Mr. Livesay his Chief Deputy, at the time Mr. Goldstein was prosecuted and convicted. JA 19-20; TR 71 at 38-39; AER 50-51. The Second Amended Complaint repeated plaintiff's general allegations concerning Fink's perjurious testimony and the failure of the deputy district attorneys at trial to discern and disclose the fact that Fink had received favorable treatment for cooperating in the prosecution.

Specifically, Mr. Goldstein alleged that two weeks prior to his own preliminary hearing, the deputy district attorney prosecuting Fink in another matter was aware that Fink would be provided with a beneficial plea bargain in the event he provided assistance with Goldstein's prosecution and that indeed, Fink's sentencing was delayed until after he was to testify at Mr. Goldstein's preliminary hearing. JA 41-42; TR 71 at 19; AER 31.

Mr. Goldstein further alleged that consistent with the "policy, practice, and custom of the Los Angeles County District Attorney's Office," the district attorney prosecuting Fink's case failed to provide

"impeachment information," i.e., the benefits Fink had been promised, to the deputy district attorneys handling Mr. Goldstein's case or to "disseminate such information regarding Fink in a manner that would inform all deputy district attorneys using Fink as an informant." JA 42; TR 71 at 20; AER 32. These failures were then repeated by a second deputy district attorney who handled Fink's sentencing and secured a reduced sentence based upon Fink's testimony in the Goldstein criminal case. JA 42-43; TR 71 at 20; AER 32. He too, failed to disclose this information to the deputy district attorneys prosecuting Mr. Goldstein, or to generally disseminate the information in a manner that would inform all deputy district attorneys who might use Fink as an informant. *Id.*

These failures were the purported result of the failure of Mr. Van de Kamp and Mr. Livesay as "primary policymakers who would make the administrative decisions of [the District Attorney's] office, including "the training of Deputy District Attorneys throughout the office as a whole." JA 45; TR 71 at 22; AER 34. Thus, plaintiff alleged that Mr. Van de Kamp and Mr. Livesay were aware of the "pervasive use of jailhouse informants within the County of Los Angeles" and had "substantial notice that false testimony by informants had occurred repeatedly" but that they had "purposefully or with deliberate indifference failed to create any system for the Deputy District Attorneys handling criminal cases to access information pertaining to the benefits provided to jailhouse informants and other impeachment information, and

failed to train Deputy District Attorneys to disseminate information pertaining to benefits provided to jailhouse informants and other impeachment information." JA 45-46; TR 71 at 22; AER 34.

Mr. Goldstein further alleged that prior to his prosecution, Mr. Van de Kamp and Mr. Livesay had "considered the creation of a system to track the benefits provided to jailhouse informants and other impeachment information, but no such system was instituted." JA 46; TR 71 at 22-23; AER 34-35. Thus, according to plaintiff, Mr. Van de Kamp and Mr. Livesay:

> [F]ailed to create a system, failed to train and failed to supervise Deputy District Attorneys who handled jailhouse informants, to provide Deputy District Attorneys, including the Deputy District Attorneys who prosecuted Plaintiff, with information with regard to jailhouse informants, including the jailhouse informant who testified against Plaintiff, although required to do so by law.

JA 69-70; TR 71 at 39; AER 51.

Plaintiff specifically identified the "impeachment information which the defendant John Van de Kamp and defendant Curt Livesay failed to instruct representatives of the Los Angeles County District Attorney's Office to disseminate throughout the office" as including:

1. "[T]he benefits the jailhouse informant was receiving for his cooperation against a criminal defendant";

2. "[T]he jailhouse informant's history of cooperation with law enforcement"; and

3. "[O]ther factors relating to the jailhouse informant's credibility." JA 70; TR 71 at 39-40; AER 51-52.

Finally, Mr. Goldstein alleged that Mr. Van de Kamp and Mr. Livesay as the "administrators and policymakers of the Los Angeles County District Attorney's Office, were aware of the obvious risks of not creating such a system and of not training Deputy District Attorneys to disseminate this impeachment information on jailhouse informants and of the wrongful convictions that occurred as a result thereof." JA 70; TR 71 at 40; AER 52.

C. Petitioners File A Motion To Dismiss The Second Amended Complaint.

On February 1, 2006, Mr. Van de Kamp and Mr. Livesay filed a motion to dismiss the Second Amended Complaint. TR 79. They argued that the defendants' purported decisions concerning policies and training of deputy district attorneys regarding the obligation to disclose exculpatory information under *Brady* and *Giglio* were intimately related to the judicial phase of prosecution and hence were absolutely immune under this Court's decision in

Imbler v. Pachtman, 424 U.S. 409, 430 (1976). TR 79 at 7-15.

On February 17, 2006, plaintiff filed opposition, arguing that the alleged actions of Mr. Van de Kamp and Mr. Livesay were "administrative" in nature and not prosecutorial, and hence fell outside of absolute immunity. TR 80 at 3-17. The defendants filed a reply (TR 82), and on March 6, 2006, the district court entered its order denying the motion to dismiss. TR 83-84; App. 21.

Pursuant to *Mitchell v. Forsyth*, 472 U.S. 511, 525 (1985), on April 5, 2006 Mr. Van de Kamp and Mr. Livesay timely filed a notice of interlocutory appeal from the district court's order. TR 85; AER 59.

D. The Ninth Circuit's Decision Affirming The Judgment.

Following briefing and oral argument, on March 28, 2007 the Ninth Circuit issued its published opinion affirming the order of the district court, subsequently amending its opinion on April 4, 2007 to correct a typographical error. App. 1-15.

The Ninth Circuit acknowledged that it had previously held that supervising prosecutors were absolutely immune from liability arising from decisions concerning whether to prosecute a particular category of cases. App. at 12; *see Roe v. City and County of San Francisco*, 109 F.3d 578, 583-84 (9th Cir. 1997). The Ninth Circuit also noted that "it may

be possible for an act to be prosecutorial in function but administrative in form," but concluded it need not decide the issue. App. at 13. This was because the court concluded that the conduct attributed to Mr. Van de Kamp and Mr. Livesay – the alleged "failure to promulgate policies regarding the sharing of information relating to informants and their failure to adequately train and supervise deputy district attorneys on that subject" – was not prosecutorial, but simply "administrative." App. at 15.

The Ninth Circuit did not analyze the nature of the policies or training at issue nor the need for prosecutorial knowledge and judgment in formulating them. Instead, the court focused on the number of cases subject to such decisions, suggesting that the broader the impact of any decision the more likely it was administrative. According to the court, petitioners' alleged actions were therefore administrative because they "bear a close relationship only to how the District Attorney's Office was managed, not to whether or how to prosecute a particular case or even a particular category of cases." App. at 15, footnote omitted.

SUMMARY OF ARGUMENT

The Ninth Circuit's decision is squarely at odds with the "functional approach" this Court has used in *Imbler v. Pachtman*, 424 U.S. 409 (1976), and its progeny in analyzing absolute immunity as applied to the actions of prosecutors. Under this Court's

precedents the decisions of a chief prosecutor such as a District Attorney or other supervising district attorneys concerning compliance with *Brady v. Maryland*, 373 U.S. 83 (1963) and *Giglio v. United States*, 405 U.S. 150 (1972) are necessarily closely related to the judicial process and taken squarely as a result of their responsibility as prosecutors.

First, this Court has expressly held that absolute immunity shields individual prosecutors from civil rights claims arising from the alleged failure to comply with the obligation to provide a defendant with exculpatory information under *Brady*. *Imbler*, 424 U.S. at 431 n.34. There is no meaningful basis to distinguish between actions of an individual prosecutor with respect to compliance with *Brady* and the actions of a chief advocate or supervising prosecutor in making decisions concerning polices and training that dictate the manner in which prosecutors comply with *Brady*, including disclosing impeachment information under *Giglio*.

A chief advocate such as former District Attorney Van de Kamp, or a supervising advocate such as his former assistant Mr. Livesay, inherently acts in a prosecutorial role in dictating the manner in which cases will be prosecuted through the formulation of policies and practices as well as specifying the training of their prosecutors. Setting prosecutorial guidelines in advance through blanket policy or specific training is no different in effect than making such decisions in a particular case. It requires professional knowledge and prosecutorial judgment. By necessity,

a chief prosecutor must channel his or her prosecutorial decisions through the formulation of policies and training, but the decisions nonetheless remain prosecutorial in nature.

Second, the same compelling policies that necessitate recognition of absolute immunity for individual frontline prosecutors, similarly require application of absolute immunity to bar claims against chief advocates and supervising prosecutors for decisions concerning implementation of polices and training regarding *Brady* and *Giglio*.

In granting individual prosecutors absolute immunity for actions closely related to the judicial process this Court has recognized that prosecutors are inevitably the target of retaliatory and vexatious claims. The danger of being dragged into protracted litigation is exponentially multiplied for chief advocates and supervising prosecutors whose agencies may prosecute hundreds or even thousands of cases a year. The specter of even defending such burdensome claims may deter chief advocates from exercising independent prosecutorial judgment and impair vigorous enforcement of the law.

Moreover, individual frontline prosecutors, even if immune from liability for their conduct, will invariably be dragged into such litigation against their supervisors since their testimony will be necessary to establish what occurred in the prosecution and the reasons for their actions. This is the very sort of time-intensive judicial inquiry and entanglement in litigation that *Imbler* sought to foreclose. Failure to

afford chief advocates and supervisory prosecutors absolute immunity for decisions concerning policy and training regarding prosecutorial duties, including the duty to disclose exculpatory evidence under *Brady* and *Giglio*, will spawn a flood of litigation ensnaring prosecutors at every level, to the detriment of all in performing their vital duties.

For these reasons, the judgment of the Ninth Circuit must be reversed with directions to dismiss the action as to Mr. Van de Kamp and Mr. Livesay based on absolute immunity.

ARGUMENT

CHIEF ADVOCATES AND SUPERVISING PROSECUTORS ACT AS ADVOCATES OF THE STATE AND PERFORM A PROSECUTORIAL FUNCTION CLOSELY RELATED TO THE JUDICIAL PROCESS IN MAKING DECISIONS ON POLICY AND TRAINING CONCERNING THE MANNER IN WHICH PROSECUTORS IN ALL CASES COMPLY WITH THE OBLIGATION TO PROVIDE EXCULPATORY EVIDENCE UNDER *BRADY V. MARYLAND* AND *GIGLIO V. UNITED STATES*.

A. Prosecutors Are Entitled To Absolute Immunity When They Perform Functions That Are Closely Related To The Judicial Process.

1. *Imbler v. Pachtman*.

In *Imbler v. Pachtman*, 424 U.S. 409 (1976), this Court held that a state prosecutor was entitled to

absolute immunity from a suit by a former criminal defendant under 42 U.S.C. § 1983 alleging that the prosecutor had knowingly used false testimony and had allowed a defense expert to suppress exculpatory evidence. 424 U.S. at 427. The Court observed that under American common law, prosecutors were immune from liability for malicious prosecution based on considerations of public policy stemming from the fear that the availability of a potential tort claim arising from any unsuccessful prosecution might deter prosecutors in the independent and vigorous performance of their duties. *Id.* at 423. The Court then concluded that the "same considerations of public policy that underlie the common-law rule" similarly supported absolute immunity for prosecutorial actions under § 1983. *Id.* at 423-25. The Court held:

> If a prosecutor had only a qualified immunity, the threat of § 1983 suits would undermine performance of his duties no less than would the threat of common-law suits for malicious prosecution. A prosecutor is duty bound to exercise his best judgment both in deciding which suits to bring and in conducting them in court. The public trust of the prosecutor's office would suffer if he were constrained in making every decision by the consequences in terms of his own potential liability in a suit for damages. Such suits could be expected with some frequency, for a defendant often will transform his resentment at being prosecuted into the ascription of improper and malicious actions to the

> State's advocate. Further, if the prosecutor could be made to answer in court each time such a person charged him with wrongdoing, his energy and attention would be diverted from the pressing duty of enforcing the criminal law.

Id. at 424-25 (citations omitted).

The Court found that qualified immunity would not afford sufficient protection in the context of claims arising from the prosecutorial process. This is because the number and complexity of potential issues that arise in a typical criminal proceeding such as "possible knowledge of a witness' falsehoods, the materiality of evidence not revealed to the defense, the propriety of a closing argument, and – ultimately in every case – the likelihood that prosecutorial misconduct so infected a trial as to deny due process" would necessarily "require a virtual retrial of the criminal offense in a new forum, and the resolution of some technical issues by the lay jury." *Id.* at 425. The result is that "the honest prosecutor would face greater difficulty in meeting the standards of qualified immunity than other executive or administrative officials." *Id.*

Finally, the Court observed that although the rule of absolute immunity leaves "the genuinely wronged defendant without civil redress against a prosecutor whose malicious or dishonest action deprives him of liberty," providing a prosecutor with lesser, qualified immunity "would prevent the vigorous and fearless performance of the prosecutor's duty

that is essential to the proper functioning of the criminal justice system." 424 U.S. at 427-28. Moreover, the Court noted that the absence of civil liability for such conduct does not leave the public "powerless to deter misconduct or to punish that which occurs," since prosecutors would remain subject to criminal liability as well as "unique, among officials whose acts could deprive persons of constitutional rights," subject to "professional discipline by an association of his peers." *Id.* at 429.

2. The Court has uniformly applied *Imbler's* "functional approach" to claims of absolute immunity.

The considerations identified by *Imbler* as relevant to determining whether a particular function performed by prosecutors necessitates the broad protection of absolute immunity – the likelihood of vexatious, retaliatory claims, the availability of judicial process to discern and correct transgressions and the presence of other restraints on the actor in question – have been repeatedly reaffirmed by the Court.

In *Mitchell v. Forsyth*, 472 U.S. 511, 520 (1985), the Court found that the Attorney General was not entitled to absolute immunity from liability arising from his authorization of a warrantless wiretap for the purposes of gathering intelligence regarding the activities of a radical group that purportedly threatened national security. The Court reaffirmed *Imbler*

in observing that the Attorney General would be immune for acts taken in a prosecutorial capacity, but concluded that performing the "national security function" did not implicate the same policy considerations and was, hence, subject solely to qualified immunity. *Id.* at 520-21.

In so holding, the Court noted that "the performance of national security functions does not subject an official to the same obvious risks of entanglement in vexatious litigation as does the carrying out of the judicial or 'quasi-judicial' tasks that have been the primary wellsprings of absolute immunities." *Id.* at 521. This is because the "judicial process is an arena of open conflict, and in virtually every case there is, if not always a winner, at least one loser," and "[i]t is inevitable that many of those who lose will pin the blame on judges, prosecutors, or witnesses and will bring suit against them in an effort to relitigate the underlying conflict." *Id.* at 521-22. In contrast, the national security tasks "are carried out in secret; open conflict and overt winners and losers are rare. Under such circumstances, it is far more likely that actual abuses will go uncovered than that fancied abuses will give rise to unfounded and burdensome litigation." *Id.* at 522.

The Court further observed that unlike the prosecutorial forum where "the judicial process is largely self-correcting: procedural rules, appeals, and the possibility of collateral challenges obviate the need for damages actions to prevent unjust results" there were no "built-in restraints on the Attorney

General's activities in the name of national security. . . . " *Id.* at 522-23.

In *Burns v. Reed*, 500 U.S. 478 (1991), the Court held that a State prosecutor's actions in "appearing before a judge and presenting evidence in support of a motion for a search warrant – clearly involve[d] the prosecutor's 'role as advocate for the State,' rather than his role as 'administrator or investigative officer. . . . '" *Id.* at 491. These sorts of "pretrial court appearances by the prosecutor in support of taking criminal action against a suspect present a substantial likelihood of vexatious litigation that might have an untoward effect on the independence of the prosecutor." *Id.* at 492. Hence, "absolute immunity for this function serves the policy of protecting the judicial process, which underlies much of the Court's decision in *Imbler*." *Id.* Moreover, as in *Imbler*, "the judicial process is available as a check on prosecutorial actions at a probable-cause hearing" and such "'safeguards built into the judicial system tend to reduce the need for private damages actions as a means of controlling unconstitutional conduct.'" *Id.* at 492 (quoting *Butz v. Economou*, 438 U.S. 478, 512 (1978)).

In contrast, the Court found that the prosecutor's act of providing legal advice to the police was not shielded by absolute immunity at common law (*Id.*), and that "[a]dvising the police in the investigative phase of a criminal case was not so 'intimately associated with the judicial phase of the criminal process' that it qualifies for absolute prosecutorial immunity."

Id. at 493 (citation omitted). The Court noted that the risk of vexatious litigation arising from providing such legal advice was substantially less than prosecution of criminal charges. This is because a prosecutor appearing in court or filing a pleading is a conspicuous target, but a suspect or criminal defendant is less likely to be aware of a prosecutor's role in providing investigative advice to the police. 500 U.S. at 494. In addition, the Court observed that the judicial process would not act as a check on "out-of-court activities by a prosecutor that occurr[ed] prior to the initiation of a prosecution, such as providing legal advice to the police," particularly where a criminal suspect is not eventually prosecuted. *Id.* at 496.

In *Buckley v. Fitzsimmons*, 509 U.S. 259 (1993), the Court reaffirmed its "functional approach" to absolute immunity in holding that a state prosecuting attorney was not absolutely immune from liability under section 1983 arising from the prosecutor's alleged participation in a scheme to fabricate evidence implicating the plaintiff during the investigation of potential criminal charges, as well as liability arising from statements the prosecutor made when subsequently announcing an indictment. In so holding; the Court rejected the plaintiff's contention that absolute immunity attached solely to the initiation of a prosecution in presenting the State's case in court. *Id.* at 272. Citing *Imbler* and *Burns*, the Court observed:

> We expressly stated that "the duties of the prosecutor in his role as advocate for the

> State involve actions preliminary to the initiation of a prosecution and actions apart from the court room," and are nonetheless entitled to absolute immunity. We noted in particular that an out-of-court "effort to control the presentation of [a] witness' testimony" was entitled to absolute immunity because it was "fairly within [the prosecutor's] function as an advocate." To be sure, *Burns* made explicit the point we had reserved in *Imbler*: A prosecutor's administrative duties and those investigatory functions *that do not relate to an advocate's preparation for the initiation of a prosecution or for judicial proceedings* are not entitled to absolute immunity. We have not retreated, however, from the principle that acts undertaken by a prosecutor in preparing for the initiation of judicial proceedings or for trial, and which occur in the course of his role as an advocate for the State, are entitled to the protections of absolute immunity. Those acts must include the professional evaluation of the evidence assembled by the police and appropriate preparation for its presentation at trial or before a grand jury after a decision to seek an indictment has been made.

Id. at 272-73 (emphasis added, citations omitted).

The Court thus drew a distinction between the prosecutor's role as an advocate in evaluating evidence and interviewing witnesses in preparation for trial and the actions of a prosecutor working with, or in place of, the police "in searching for the clues and

corroboration that might give him probable cause to recommend that a suspect be arrested. . . . " *Id.* at 273. With respect to the remarks at the press conference, the Court found they fell outside of absolute immunity because they "have no functional tie to the judicial process just because they are made by a prosecutor." *Id.* at 277. As the Court emphasized, the "press conference does not involve the initiation of a prosecution, the presentation of the State's case in court, or actions preparatory for these functions." *Id.* at 278.

In *Kalina v. Fletcher*, 522 U.S. 118 (1997), the Court held that a State prosecutor was absolutely immune from section 1983 liability arising from the preparation and filing of a charging document and motion for arrest warrant, finding that the actions fit squarely within *Imbler*. 522 U.S. at 130-31. However, the Court held that the prosecutor was entitled to only qualified immunity for purportedly making false statements as a complaining witness in a supporting affidavit since "[t]estifying about facts is the function of the witness, not of the lawyer." *Id.* at 130. The risk of vexatious litigation was minimal, because attorneys were not required to serve as complaining witnesses, and could avoid liability by simply allowing others to fulfill this role. *Id.* at 129-31.

The Court has also applied the "functional approach" in analyzing absolute immunity claims outside the context of State criminal prosecutors. *See Butz v. Economou*, 438 U.S. 478, 515 (1978) (agency counsel prosecuting administrative proceedings were

entitled to absolute immunity under *Imbler* since such proceedings were functionally equivalent to criminal prosecution); *Briscoe v. Lahue*, 460 U.S. 325, 341-43, 345-46 (1983) (witness entitled to immunity for performing key function of the judicial process in providing testimony at trial); *Harlow v. Fitzgerald*, 457 U.S. 800, 806-13 (1982) (function of presidential assistants in providing advice to president does not justify absolute immunity); *Forrester v. White*, 484 U.S. 219, 229 (1988) (judge not entitled to absolute immunity from section 1983 claim by probation officer who asserted judge demoted and discharged her on account of gender because in making basic employment decisions a judge functions no differently than any other executive officer).

As we discuss, application of this Court's "functional approach" to absolute immunity makes it clear that Mr. Van de Kamp and Mr. Livesay are entitled to absolute immunity in this action.

B. The Decisions Of Chief Advocates And Supervising Prosecutors In Directing The Manner In Which Cases Are Prosecuted, Including Compliance With *Brady* And *Giglio* Through Setting Policies And Training, Are Prosecutorial In Nature, Closely Related To The Judicial Process And Therefore Subject To Absolute Immunity.

It is presumed that qualified immunity is ordinarily sufficient to protect government employees from unwarranted litigation arising from performance of

their duties, and a defendant bears the burden of establishing that he or she is entitled to absolute immunity. *Forrester*, 484 U.S. at 224; *Burns*, 500 U.S. at 486; *Butz*, 438 U.S. at 506. Although the Court has been "quite sparing" in applying absolute immunity to various functions, *Forrester*, 484 U.S. at 224, *Burns*, 500 U.S. at 487, nonetheless, as noted above, the Court has repeatedly reaffirmed that the actions of government attorneys in undertaking tasks intimately related to the prosecution of cases are closely related to the judicial process and hence common-law based policy considerations compel application of absolute immunity. The actions plaintiff attributes to Mr. Van de Kamp and Mr. Livesay in this case squarely fall within the prosecutorial function, are closely related to the judicial process and the defendants are therefore protected from liability by absolute immunity.

1. Prosecutorial decisions concerning compliance with *Brady* and *Giglio* are subject to absolute immunity.

Although defendants vigorously dispute both the factual and legal basis for Mr. Goldstein's underlying claims against them, nonetheless they acknowledge that for purposes of the absolute immunity analysis the Court must make "two important assumptions about the case: first, that petitioners['] allegations are entirely true; and, second, that they allege constitutional violations for which § 1983 provides a remedy."

Buckley, 509 U.S. at 261; *see also Kalina*, 522 U.S. at 122.

To that end, Mr. Goldstein alleges that Mr. Van de Kamp, as District Attorney, and Mr. Livesay, as his assistant, were policymakers for the Los Angeles County District Attorney's Office prior to and at the time Mr. Goldstein was prosecuted. JA 68-71; AER 50-52; TR 71 at 38-40. He asserts that these two defendants were responsible for implementing policy and training to assure that Deputy District Attorneys were able to comply with the general obligation to disclose its exculpatory information pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963), and more particularly, to disclose information as to whether a prosecution witness had received consideration for providing testimony in a criminal proceeding under *Giglio v. United States*, 405 U.S. 150 (1972). JA 68-71; AER 50-52; TR 71 at 38-40. According to Mr. Goldstein, because defendants decided not to enact particular policies or provide particular training, the prosecutor in his case never learned that Fink, the jailhouse informant, had been promised, and had received, beneficial sentencing in exchange for providing testimony against Mr. Goldstein. JA 71; AER 52; TR 71 at 40. As a result, Mr. Goldstein was improperly convicted in violation of due process. JA 68-69; AER 50-51; TR 71 at 38-39.

In *Giglio*, this Court held that the failure of the prosecution to disclose information bearing on the credibility of a prosecution witness violated due process so as to necessitate a new trial. 405 U.S. at

154-55. The requirement that the prosecution disclose such impeachment evidence stems from this Court's decision in *Brady* concerning the obligation of the prosecution to disclose evidence that is favorable to the accused and material to either guilt or punishment. *Id.* at 154; *Brady*, 373 U.S. at 87; *United States v. Bagley*, 473 U.S. 667, 674-76 (1985).

In *Imbler*, this Court held that claims arising from an individual prosecutor's alleged failure to disclose exculpatory information under *Brady* was simply the flip side of a claim that the prosecutor suppressed evidence, and hence was shielded from absolute immunity since the conduct arose in the course of presenting the prosecution's case. 424 U.S. at 431 n.34. In subsequent cases, the Court has reaffirmed the scope of *Imbler* as encompassing "a charge that false testimony ha[s] been offered as well as a charge that exculpatory evidence ha[s] been suppressed." *Kalina*, 522 U.S. at 124; *see also Burns*, 500 U.S. at 486 ("*Imbler* involved . . . the alleged knowing use of false testimony at trial and the alleged deliberate suppression of exculpatory evidence.") Consistent with *Imbler* and its progeny, the circuit courts have also found that claims against an individual prosecutor based upon a failure to comply with *Brady* are subject to absolute immunity. *See, e.g., Moore v. Valder*, 65 F.3d 189, 194 (D.C. Cir. 1995); *Reid v. New Hampshire*, 56 F.3d 332, 336 (1st Cir. 1995); *Hill v. City of New York*, 45 F.3d 653, 661-62 (2d Cir. 1995); *Carter v. Burch*, 34 F.3d 257, 262-63 (4th Cir. 1994); *Broam v. Bogan*, 320 F.3d 1023, 1030

(9th Cir. 2003); *Long v. Satz*, 181 F.3d 1275, 1279 (11th Cir. 1999); *Buckley v. Fitzsimmons*, 20 F.3d 789, 794 (7th Cir. 1994), *cert. denied*, 513 U.S. 1085 (1995) (noting plaintiff "does not allege concealment [of impeachment evidence under *Giglio*] at trial, which would in any event be comfortably within the scope of absolute prosecutorial immunity under *Imbler v. Pachtman*" (citation)).

2. Decisions concerning policy and training governing disclosure of exculpatory information under *Brady* and *Giglio* are functionally indistinguishable from decisions made by an individual prosecutor with respect to those obligations.

In its opinion, the Ninth Circuit offers no principled basis for distinguishing between an individual prosecutor's failure to disclose exculpatory information under *Brady* and *Giglio*, and the action of chief advocates and supervising prosecutors such as Mr. Van de Kamp and Mr. Livesay in purportedly failing to properly direct the manner in which individual prosecutors comply with these obligations through implementation of policies and training. First, the court ignores the fact that the very policies and training at issue are necessarily "closely related" to the prosecutorial and judicial process. The duty to disclose exculpatory information under *Brady* and *Giglio* arises *only* in the context of prosecution. Thus, decisions regarding the alleged policies and training are not matters simply "'to *some* degree related to

trial preparation. . . .'" App. at 14 (emphasis added). Rather they are *directly* related to such preparation – the entire focus of any such policies or training is the prosecutorial phase of criminal proceedings.

For example, in addressing any perceived problems with the use of jailhouse informants a chief advocate or supervising prosecutor could simply enact a blanket policy prohibiting use of such witnesses. It is difficult to conceive of an act more directly related to a criminal prosecution, than dictating the witnesses that may be called in support of the State's case. That is what advocates do. Decisions concerning policies and training as to other aspects of prosecution, such as compliance with *Brady* and *Giglio*, are no less prosecutorial in nature.

Policies and training are nothing more than a substitute for the personal involvement of a chief advocate or a supervising attorney in each individual prosecution. Logistics in most prosecutorial offices, particularly large prosecutorial agencies,. make it virtually impossible for a chief prosecutor or even higher level supervising prosecutors to be involved in every single case at every moment on a personal basis. However, setting policy and training standards allow them to impose their prosecutorial judgment in all of the cases prosecuted within their office.

Nor does it matter that these decisions are made, via policy and training, in advance of any particular prosecution. As the Court emphasized in *Buckley*, the *Imbler* Court recognized that "'the duties of the

prosecutor in his role as advocate for the State involve actions preliminary to the initiation of prosecution and actions apart from the courtroom,'" and that such actions are subject to absolute immunity. *Buckley*, 509 U.S. at 272 (quoting *Imbler*, 424 U.S. at 431 n.33).

The Ninth Circuit also offers no reason why it makes a difference whether a chief advocate or supervising prosecutor makes a decision with respect to one case or many cases. As this Court has made clear, the focus is always on the nature of the function performed by the defendant seeking immunity. Here, Mr. Van de Kamp and Mr. Livesay are taken to task for decisions made with respect to setting policy and training standards that directly impact the prosecution of criminal cases. It is not incidental that they are the individuals making those decisions – they make those decisions as prosecutors and as advocates on behalf of the State in the course of criminal proceedings. Setting of prosecutorial standards and training within a particular office, is not a task normally performed by someone else. *Buckley*, 509 U.S. at 273-74 (prosecutor only had a qualified immunity for "investigative functions normally performed by a detective or police officer"); *Kalina*, 522 U.S. at 130-31 (prosecutor did not have absolute immunity for executing an affidavit in support of a probable cause determination because "[t]estifying about facts is the function of the witness, not of the lawyer"); *Forrester*, 484 U.S. at 228-29 (hiring of probation officer was not a judicial act for purposes of

absolute immunity, since in hiring and firing a judge is no different than any other "Executive Branch official who is responsible for making such employment decisions").

Moreover, the creation of such policies and training standards requires the "exercise of the judgment of the advocate." *Kalina*, 522 U.S. at 130. Although the Ninth Circuit characterizes defendants' alleged transgression as a failure to "develop a policy of sharing information regarding jailhouse informants" and failure to "provide adequate training and supervision on this issue" (App. at 11), it ignores the fact that creating such polices and training standards requires an understanding of the applicable law and its impact on the manner in which cases are prosecuted. Indeed, while plaintiff alleged that petitioners failed to assure that information concerning an informant's past cooperation with law enforcement or receipt of benefits for testifying be shared within the office, plaintiff also asserts that defendants failed to provide information concerning "*other* factors relating to the jailhouse informant's credibility." JA 69-70; TR 71 at 39-40; AER 51-52 (emphasis added). Yet, determining what these "other" factors may be necessarily requires an advocate's review and application of the governing law in the context of a criminal prosecution.

In finding the actions of Mr. Van de Kamp and Mr. Livesay to be "administrative," the Ninth Circuit suggested that the broader the application of any prosecutorial policy or training, the more likely that

it would be "administrative" in nature and hence not fall within absolute immunity. Consistent with its prior decisions, the court suggested (but did not decide) that in contrast, a chief prosecutor's decisions made with respect to a particular category of cases might still fall within absolute immunity. App. at 13. But as noted, the mere fact that a chief prosecutor makes decisions in advance with respect to prosecution of all cases does not make his or her actions any less prosecutorial in nature. Indeed, it is difficult to envision how a line can be meaningfully drawn between a policy or training decision directing the manner of prosecution in every case within an office, and those with respect to prosecution of a particular case or even group of cases.

Nor does the Ninth Circuit's decision articulate any standard as to when a supervising prosecutor's actions become administrative as opposed to prosecutorial in nature. A complex criminal prosecution may involve a lead prosecutor and numerous deputies. Under *Imbler*, it must follow that the lead prosecutor would be absolutely immune from any liability based upon his purportedly assigning particular tasks to particular attorneys or failure to supervise or train those attorneys with respect to that particular prosecution. Similarly, it is common for large prosecutorial offices to create task forces to prosecute a particular category of cases. At what point, based on what number of cases within his or her supervisory authority, does the lead prosecutor of a task force make the transition from prosecutor to an "administrator"

whose actions fall outside the scope of absolute immunity?

Neither the Ninth Circuit nor the cases that it cites in support of its conclusion that decisions concerning policies and training are necessarily "administrative," offers any meaningful definition of the term nor precise standards for it application. *Walker v. City of New York*, 974 F.2d 293, 295-96 (2d Cir. 1992), did not involve a claim of absolute immunity, but rather municipal liability under *Monell v. New York City Department of Social Services*, 436 U.S. 658 (1978), and hence had no reason to, and did not consider, the factors pertinent to this Court's "functional approach" to absolute immunity. *Carter v. City of Philadelphia*, 181 F.3d 339 (3d Cir. 1999), focused largely on whether the prosecuting agency constituted an arm of the State for purposes of the Eleventh Amendment, and its analysis of absolute immunity and the question of whether particular acts are administrative or prosecutorial is conclusory and without analysis.

The absence of any meaningful standards for determining when conduct is "administrative" for purposes of falling outside the protection of absolute immunity underscores the fact that the Ninth Circuit has essentially used the term as shorthand to describe conduct that falls outside of the immunity. Yet, there's no indication in this Court's decisions that even assuming conduct can be described as "administrative" that it necessarily falls outside the scope of absolute immunity. In the course of prosecuting

individual cases an attorney may undertake numerous tasks that could be described as administrative, indeed clerical in form, such as making witness lists, keeping track of material subject to *Brady* disclosure, or taking notes, that are nonetheless directly related to prosecution of the case and hence subject to absolute immunity. *Cf. Antoine v. Byers & Anderson, Inc.*, 508 U.S. 429, 435 (1993) ("We do not doubt that judicial notetaking as it is commonly practiced is protected by absolute immunity, because it involves the kind of discretionary decisionmaking that the doctrine of judicial immunity is designed to protect").

In fact, the Court has carefully stated only that: "A prosecutor's administrative duties and those investigatory functions *that do not relate to an advocate's preparation for the initiation of a prosecution or for judicial proceedings* are not entitled to absolute immunity." *Buckley*, 509 U.S. at 273 (emphasis added). Accordingly, "administrative duties" that *do* "relate to an advocate's preparation for the initiation of a prosecution for judicial proceedings" would still be subject to absolute immunity.

At the end of the day, under the "functional approach" to absolute immunity applied by this Court, the key question is whether the decisions attributed to Mr. Van de Kamp and Mr. Livesay are "closely" or "intimately" related to the judicial process. The alleged decisions concerning policies and training directing the manner in which prosecutors within their office would comply with their obligations under *Brady* and *Giglio* – obligations that arise

solely in the context of the prosecution of cases – are necessarily closely related to the judicial process and taken in their role as advocates for the State. Hence, plaintiff's action against Mr. Van de Kamp and Mr. Livesay is barred by absolute immunity.

C. The Proper Functioning Of The Judicial Process And Independent And Vigorous Exercise Of Prosecutorial Judgment Requires Application Of Absolute Immunity To Chief Advocates And Supervising Attorneys.

1. Prosecutors at every level – both frontline and supervisory – would be entangled in litigation if chief advocates and supervising attorneys are not afforded absolute immunity for decisions concerning prosecutorial policy and training.

The same common law based policy considerations that underlie the Court's recognition of absolute immunity for individual prosecutors in carrying out their prosecutorial functions equally compel application of the immunity to chief advocates and other supervising attorneys with respect to decisions directing the manner in which cases are prosecuted through creation and implementation of policy and training. As the Court has repeatedly observed, because of the adversarial nature of criminal proceedings, with clear-cut winners and losers, prosecutors are an inevitable target for retaliation. *Imbler*, 424 U.S. at 424-25; *Mitchell*, 472 U.S. at 521-22. It is this concrete, pervasive threat of vexatious and retaliatory suits

that serves as the common law rationale for absolute immunity. *Imbler*, 424 U.S. at 422-23; *Forrester*, 484 U.S. at 225-26.

This exposure is even greater for chief advocates such as a District Attorney, Attorney General, or United States Attorney whose office prosecutes hundreds, and in some cases thousands of cases each year. Litigants foreclosed from suing courtroom prosecutors for alleged misconduct will simply retool their claims and assert that the alleged prosecutorial misconduct was the result of improper policy or training on the part of the chief advocate or a supervising prosecutor.

Nor would qualified immunity afford an appropriate degree of protection since, as this Court has recognized, assertion of that defense in the context of a criminal proceeding typically requires an intensive factual rehashing of the underlying criminal proceedings. *Imbler*, 424 U.S. at 425. Indeed, allowing an end-run around absolute prosecutorial immunity by simply suing a chief advocate or supervising attorney subjects not only those prosecutors but frontline courtroom prosecutors to participation in follow-on litigation. Regardless of whether they themselves may be held liable, the courtroom prosecutors would, after all, still have to testify as to the nature and circumstances of the underlying prosecution and their various decisions in order to determine whether their actions were the result of policy or training. This is the very entanglement in litigation that absolute immunity was intended to foreclose.

The specter of such lawsuits would improperly chill the prosecutorial discretion and judgment of chief prosecutors and supervisors in making decisions concerning the manner in which cases are prosecuted through creation and implementation of policy and training. Fear of being the target of protracted litigation arising from cases involving particular types of witnesses, whether they be jailhouse informants or anyone with a criminal record that might create greater exposure to potential *Brady* and *Giglio* claims would inevitably tempt even the most conscientious prosecutorial officials to simply bar use of such witnesses as a general matter, regardless of the value of such witnesses in a particular case. Indeed, as the D.C. Circuit noted in *Haynesworth v. Miller*, 820 F.2d 1245 (D.C. Cir. 1987), *abrogated on unrelated point by Hartman v. Moore*, 547 U.S. 250, 256, 265-66 (2006), the "very real" threat of potential liability "indubitably would inhibit the performance of prosecutorial duties" by making chief advocates and supervising attorneys "timid about formulating policy" and perhaps causing them to "forego policy making altogether." 820 F.2d at 1270 n.199.

Similarly, the prospect of frequent entanglement in "policy and training" claims against their supervisors will inevitably impact the decision making and actions of frontline prosecutors as well. As this Court has recognized, the specter of such suits improperly chills independent prosecutorial judgment and deters vigorous prosecution of the laws. *Imbler*, 424 U.S. at

427-28. This unacceptable burden on the judicial process mandates recognition of absolute immunity.

2. Mechanisms other than suits for damages provide a sufficient check on the decision making of chief advocates and supervising attorneys concerning prosecutorial policy and training.

The absence of a potential damage remedy against chief advocates or supervising attorneys under section 1983 does not mean that the conduct of chief advocates or supervising attorneys in performing the sort of prosecutorial functions alleged here would be insulated from review or correction. As this Court has observed, the criminal justice system itself provides multiple procedures and avenues of review to discern and correct errors or improprieties that may have led to an improper conviction. *Mitchell*, 472 U.S. at 522-23. Further, chief advocates and supervising prosecutors, like all other prosecutors, are subject to professional regulation, and in cases of egregious misconduct, even criminal liability. *Imbler*, 424 U.S. at 429. In addition, many chief advocates are selected by the electorate, and hence are accountable to the voters for their performance of their prosecutorial duties thus adding another level of scrutiny and accountability. *See Tenney v. Brandhove*, 341 U.S. 367, 378 (1951) (accountability to electorate checks legislative abuse and ameliorates harsh effect of absolute immunity of legislators); *Mitchell*, 472 U.S. at 522-23 (noting the lack of accountability or

"built-in restraints" on Attorney General's national security activities militates against grant of absolute immunity for such actions).

Whatever harsh result may obtain in individual cases, on balance these checks on potential misconduct provide ample deterrence. The alternative of exposing chief advocates and supervising prosecutors to potential liability for decisions concerning the manner in which cases are prosecuted through the formulation of policies and training, threatens prosecutorial independence and guarantees a flood of lawsuits ensnaring prosecutors at every step of the organizational ladder. As this Court has recognized, these are precisely the circumstances necessitating absolute immunity.

CONCLUSION

For the foregoing reasons, petitioners respectfully request that the judgment of the United States Court of Appeals for the Ninth Circuit be reversed with directions to reverse the order denying Mr. Van de Kamp and Mr. Livesay's motion to dismiss and to enter an order dismissing the action.

DATED: June 30, 2008

Respectfully submitted,

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RESPONDENT'S BRIEF

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Supreme Court of the United States

JOHN VAN DE KAMP and CURT LIVESAY,

Petitioners,

v.

THOMAS LEE GOLDSTEIN,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

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QUESTION PRESENTED

Respondent Thomas Goldstein was wrongly convicted on the basis of perjured testimony from a jailhouse informant. Mr. Goldstein sued Petitioners, the chief administrators of the District Attorney's Office, for deciding not to establish any system by which line prosecutors could learn of internal information about jailhouse informants that they were constitutionally obligated to turn over to the defense. Petitioners are not shielded by absolute immunity unless they can prove that this information management function was intimate to their role as courtroom advocates, and was not administrative in nature.

The question presented is whether the Court of Appeals was correct in concluding that Petitioners' information management decision was administrative, and therefore subject only to qualified immunity, where the decision, made years before Mr. Goldstein's prosecution, was not about trial tactics or what information would actually be turned over to the defense in any particular case or class of cases?

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STATEMENT OF THE CASE

Respondent Thomas Goldstein has endured an unimaginable nightmare: He spent a quarter of a century in prison for a murder he did not commit. He won his freedom after proving that the Los Angeles County District Attorney's Office violated his constitutional rights. At trial, a jailhouse informant falsely testified that Mr. Goldstein confessed the crime to him and falsely swore that the District Attorney's Office had promised him nothing in return for his testimony. The trial deputy did not know, and therefore could not disclose to the defense, that this was a lie. The deputy was in the dark for one reason: Petitioners John Van de Kamp and Curt Livesay—the chief administrators of the District Attorney's Office—had decided not to institute even the most rudimentary system for tracking information about the benefits that handlers were granting informants in return for incriminating testimony.

Mr. Goldstein now seeks to hold Petitioners accountable for their role in his wrongful conviction. There is no question that Petitioners have immunity. Even if Mr. Goldstein prevails here, Petitioners enjoy *qualified* immunity, which would shield them from liability unless they either were "plainly incompetent" or "knowingly violate[d] the law." *Malley v. Briggs*, 475 U.S. 335, 341 (1986).

The question before this Court is whether these officials are *absolutely* immune from civil suit for their decision, even if Mr. Goldstein can prove that Petitioners purposely fostered an information vacuum with the specific intent to prevent line prosecutors from learning exculpatory

information so they would not share it with innocent defendants.

Everyone agrees that Petitioners have the heavy burden of proving that they are entitled to this exceptional form of immunity. Everyone agrees that Petitioners cannot prevail unless they prove that the specific function challenged here was an advocacy function intimate to a judicial proceeding, and not administrative in nature. Petitioners cannot carry their burden. The duty Mr. Goldstein seeks to enforce—to establish an internal, office-wide information repository to be maintained by administrative personnel—is administrative in nature.

Mr. Goldstein Is Wrongfully Convicted

Mr. Goldstein was a Marine Corps veteran and an engineering student when the Long Beach Police Department arrested him for the shooting of John McGinest, in 1979. J.A. 21. Mr. Goldstein had no criminal record and no history of violence. *Id.* There was no evidence he owned a firearm, J.A. 21, 35, or that he had ever had any contact with the victim, J.A. 23. Five eyewitnesses described the possible perpetrator; none of the descriptions bore any resemblance to Mr. Goldstein. J.A. 24, 34. Summing up the evidence against Mr. Goldstein, one prosecutor lamented: "Note: this case was filed in great haste. Filing officers assure me that it will get stronger." J.A. 29.

The filing officers did not disappoint. They began by recruiting an "eyewitness" to identify Mr. Goldstein, even though, it turned out, the

witness was never able to recognize him.[1] Then, once they had Mr. Goldstein in custody, they enlisted the services of a jailhouse informant named Eddie Fink. A heroin addict and career felon, Fink had an uncanny knack for extracting confessions from cellmates. Time and again he testified to jailhouse confessions in return for favorable dispositions of his own redoubtable list of criminal charges. J.A. 30, 37-39.

The police purposely placed Fink in Mr. Goldstein's cell in the Long Beach jail to work his magic. J.A. 30. By evening, Fink returned with the goods: He reported to the police the next day that he had extracted a murder confession from Mr. Goldstein, a complete stranger, who had told everyone else that he was innocent. J.A. 29.

Fink testified to the confession both at Mr. Goldstein's preliminary hearing, J.A. 32, and at his trial, J.A. 35. Fink also swore that the Los Angeles District Attorney had not traded any benefits for his testimony against Mr. Goldstein and that he had never received any such benefits in the past. J.A. 37-38. These were both lies. Fink had struck numerous deals over the course of a decade with the Long Beach Police and the Los Angeles District Attorney in exchange for his tes-

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[1] The witness, who identified Mr. Goldstein at trial as well, would later testify at a habeas corpus hearing that he identified Mr. Goldstein at trial only because he was "intimidated" by the police, who had assured him that Mr. Goldstein was the murderer, falsely describing an avalanche of fictitious evidence against him. J.A. 26, 32-33. The Magistrate Judge who heard the habeas testimony concluded that the witness never in fact recognized Mr. Goldstein as the perpetrator. J.A. 52.

timony. J.A. 38; Pet. App. 4. More to the point, the District Attorney's Office had secured Fink's testimony against Mr. Goldstein, specifically, with a promise to slash Fink's sentence on a pending theft charge from 16 months to less than two months. J.A. 38-39; *see* J.A. 42-43.

Mr. Goldstein's trial counsel could not expose Fink as a liar because the prosecution did not disclose the deals. And the only reason the trial deputy did not disclose the truth was that he had no idea that his office had ever cut any deal with Fink in this case or any other.

In 1980, Mr. Goldstein was convicted and sentenced to life in prison. J.A. 37, 45. He spent the next 24 years facing the horrors of maximum-security prison, fighting to regain the life stolen from him. J.A. 22.

Petitioners' Information Management Decision

There is no dispute that the District Attorney's Office was constitutionally obligated—under *Brady v. Maryland*, 373 U.S. 83, 87 (1963)—to disclose to Mr. Goldstein any deal it made with Fink. Under *Giglio v. United States*, 405 U.S. 150, 154 (1972), the obligation attached so long as *someone* in the office knew about it. As this Court put it in *Giglio*: "A promise made by one attorney" to an informant "must be attributed . . . to the Government." *Id.* But the trial deputy handling Mr. Goldstein's case never fulfilled the obligation to disclose that exculpatory information, because Petitioners, as chief administrators of the office, had decided not to install any repository of informa-

tion where handlers could memorialize the deals they struck with jailhouse informants. J.A. 45.

According to the complaint—which must be taken as true for present purposes—Petitioners knew that this was a fiasco waiting to happen. J.A. 44. Petitioners knew that police officers and prosecutors were relying on testimony from career felons who, like Fink, trafficked in false jailhouse confessions in return for sentence reductions. *Id.* They knew that prosecutors were coaching informants on the art of fabricating jailhouse confessions for trial. J.A. 44, 46. They knew that this Court in 1972 had put the onus on chief prosecutors, particularly in "large prosecution offices," to establish "procedures and regulations . . . to insure communications of all relevant information on each case to every lawyer that deals with it." *Giglio*, 405 U.S. at 154. Well before the events leading to Mr. Goldstein's wrongful conviction, Petitioners had considered fulfilling this obligation by developing a system to track the benefits that handlers conferred on jailhouse informants in exchange for their testimony. J.A. 46. But they made the deliberate decision not to, because they preferred a system guaranteed to "prevent" trial deputies from learning exculpatory information that they would have to disclose to the defense. *Id.*

It was not until a decade after Mr. Goldstein's trial that the jailhouse informant scandal broke. As the complaint recounts, a Los Angeles County civil grand jury condemned Petitioners' dereliction of duty in a scathing report. *See* J.A. 49-50 (discussing *Report of the 1989-1990 Los Angeles*

County Grand Jury at 97-99 (*"Grand Jury Report"*)). The grand jury documented how the Los Angeles District Attorney's Office and various police departments within its jurisdiction routinely coached jailhouse informants to fabricate confessions from criminal defendants. J.A. 49. The practice began well before Mr. Goldstein's arrest—the grand jury documented abuses as early as 1976—and continued over the course of the ensuing decade. *Id.* The grand jury criticized Petitioners' affirmative decision not to install any "central index containing" basic information about informants, *Grand Jury Report* at 74, condemning management's behavior overall as a "deliberate and informed declination to take action necessary to curtail the misuse of jail house informant testimony." J.A. 50.

By the time the grand jury issued its report, an administrator in the District Attorney's Office had done what Petitioners should have done. Observing that "[w]e must eliminate from the People's case the risk of perjured testimony by a jailhouse informant," J.A. 48, he issued a directive establishing, for the first time, "a central jailhouse informant index," tracking pertinent information about informants, including deals struck in exchange for testimony. J.A. 49. Both the grand jury report and the information management system came a decade too late to protect Mr. Goldstein.

Mr. Goldstein Exposes the Constitutional Violation and Is Released

Another 14 years would pass before Mr. Goldstein would win his release on the ground that his

conviction was tainted by the practices the grand jury had condemned. His vindication came in the context of a federal habeas corpus proceeding. The Magistrate Judge concluded that Fink had perjured himself when he denied having received any benefits for testifying against Mr. Goldstein—or anyone else. J.A. 53-54. He rejected Fink's account of the jailhouse confession because Fink "fits the profile of the dishonest jailhouse informant that the Grand Jury Report found to be highly active in Los Angeles County at the time of [Mr. Goldstein's] conviction." J.A. 54. The District Court adopted these findings and ordered the District Attorney either to retry Mr. Goldstein or release him. *Id.* In 2003, the Court of Appeals for the Ninth Circuit affirmed. J.A. 55.

The District Attorney's Office eventually dropped the charges against Mr. Goldstein, acknowledging that it had no reliable evidence against him. J.A. 58-60. In April 2004, Mr. Goldstein walked out of the prison gates. He was 54, and had no occupation, family, or home. J.A. 60.

Mr. Goldstein Files this § 1983 Suit

Upon release from prison, Mr. Goldstein filed this lawsuit under 42 U.S.C. § 1983 seeking redress for his wrongful conviction. His complaint named Petitioners, as well as the Long Beach Police Department and several police officers. J.A. 68-70.

The complaint alleges that Petitioners had a constitutional obligation to establish "'procedures and regulations . . . to insure communications of all relevant information on each case to every

lawyer'" in the office. J.A. 43-44 (quoting *Giglio*, 405 U.S. at 154). As relevant here, the crux of the complaint is that Petitioners deliberately decided not "to create any system for the Deputy District Attorneys handling criminal cases to access information pertaining to the benefits provided to jailhouse informants," J.A. 45, and they did so "in order to prevent Deputy District Attorneys . . . from having access to impeachment information," J.A. 46; *see* J.A. 51, 69-70.

The District Court Rejects Absolute Immunity, and the Court of Appeals Affirms

Petitioners moved to dismiss the claims against them, asserting absolute prosecutorial immunity. Pet. App. 16. The District Court denied the motion. It concluded that their decision not to create any sort of information repository was "clearly" administrative in nature, and thus not entitled to the exceptional protection of absolute immunity, Pet. App. 19-20, which applies only to a prosecutor who is "'serving as an advocate in judicial proceedings,'" *Kalina v. Fletcher*, 522 U.S. 118, 127 (1997) (citation omitted). Petitioners filed an interlocutory appeal. Pet. App. 5.

A unanimous panel of the Ninth Circuit affirmed. Pet. App. 2-15. The Court of Appeals agreed that the challenged conduct was administrative in nature, and not prosecutorial. Pet. App. 15. The panel found that Petitioners' decision not to implement any internal system to memorialize and share information about informants bore "a close connection only to how the District Attorney's Office was managed, not to whether or how to prosecute a particular case or even a particular

category of cases." *Id.* Accordingly, Petitioners' conduct was not protected by absolute immunity. *Id.* The court subsequently denied rehearing en banc. Pet. App. 22.

SUMMARY OF ARGUMENT

A. Petitioners seek an exceptional form of immunity that would deprive Mr. Goldstein of a remedy even if he could prove that they purposely and maliciously set out to foment a wholesale violation of constitutional rights. There is a "presumption" against this extreme form of immunity, in favor of the robust qualified immunity that most public officials enjoy. *Burns v. Reed*, 500 U.S. 478, 486 (1991).

Under this Court's "functional approach," absolute immunity shields a prosecutor only for activities he performs "when serving as an advocate in judicial proceedings." *Kalina*, 522 U.S. at 125. Only tasks or decisions that are "intimately associated with the judicial phase of the criminal process," *Imbler v. Pachtman*, 424 U.S. 409, 430 (1976), such as decisions to initiate a prosecution and decisions on how to try a case, fall within the narrow scope of absolute immunity. *See Buckley v. Fitzsimmons*, 509 U.S. 259, 278 (1993).

B. In its effort to overcome the presumption, Petitioners' brief suffers from a fundamental disconnect. The complaint repeatedly emphasizes that Mr. Goldstein is suing Petitioners for their own decision not to develop an information management system for internal tracking of deals that handlers make with jailhouse informants. The result, the complaint alleges, was an information

vacuum that prevented line prosecutors from learning the truth about informants.

Petitioners, however, focus almost entirely on a different theory, which Mr. Goldstein has explicitly rejected: They mischaracterize Mr. Goldstein's theory as revolving around supervisors' policies and training that dictate the decisions line prosecutors make at trial. This case is not about the adequacy of training or supervision of trial conduct. So far as the trial deputy in this case knew, there was no information to disclose, and therefore no decision to make.

C. Under this Court's precedents, the information management decision challenged here is administrative, not advocacy and not intimate to any judicial proceeding.

First, when Petitioners decided not to implement an information management system, they were not involving themselves in "the initiation of a prosecution," "the presentation of the state's case in court," or in any other substantive aspect of a prosecution. *Id.* at 278. They were not even setting standards on whether, and under what circumstances, line prosecutors should share information *with the defense*. They were deciding whether to memorialize and disseminate internally information employees need to do their jobs. Managers of any government agency or business enterprise grapple with those sorts of information-dissemination questions every day. *Second*, there is nothing inherently *prosecutorial* about a system to manage information about informants. Law enforcement agencies of all sorts perform the same function. *Third*, the information management de-

cision challenged here predated the prosecution by several years.

D. Petitioners' bid for absolute immunity fails for a separate and independent reason: They have not even tried to prove, as they must, a tradition of immunity for the sort of information management function challenged here. When Congress passed § 1983, there was not a single case that extended absolute immunity to record-keeping functions, whether for prosecutors or for judges. Numerous cases declined to extend absolute immunity to judges when they were accused of errors in paper-work or recording information.

E. Petitioners' bid for absolute immunity fails also because they have not proven, as they must, yet a third point: that policy considerations support absolute immunity. Allowing Mr. Goldstein's claim to proceed will not invite a tidal wave of vexatious litigation, for the claim he presents would be available in the rarest of circumstances. Nor would defense of a lawsuit like this require a retrial of the criminal case or delve into a line prosecutor's state of mind, because the theory of this claim does not depend upon any of the *trial deputy's* decisions.

Finally, civil liability is the only meaningful device by which to hold chief administrators accountable for making systemic decisions that prevent line prosecutors from honoring constitutional rights on a grand scale. A lone judge overseeing individual collateral attacks on a specific conviction has no power to remedy a systemic scandal like the one that injured Mr. Goldstein. And neither disciplinary authorities, criminal penalties,

nor the electorate is likely to punish a prosecutor for bad management, no matter how grievous the consequences.

ARGUMENT

PETITIONERS HAVE FAILED TO CARRY THEIR HEAVY BURDEN OF PROVING THAT ADMINISTRATORS OF PROSECUTION OFFICES ARE ENTITLED TO THE EXCEPTIONAL PROTECTION OF ABSOLUTE IMMUNITY FOR DECIDING NOT TO IMPLEMENT AN INFORMATION MANAGEMENT SYSTEM.

The central issue in this case is how to characterize the challenged conduct. Was Petitioners' conduct "administrative" (in which case it deserves only to qualified immunity) or was it advocacy "intimately associated with the judicial phase of the criminal process" (in which case absolute immunity might be available)? *Kalina*, 522 U.S. at 125. *See infra* Point A.

The starting point of the analysis must be a clear understanding of what conduct Mr. Goldstein is challenging. His claim concerns Petitioners' role as managers of information, and not (as Petitioners portray it) their supervisory role of promulgating policies or training lawyers about whom to charge, how to try cases, or what information to disclose to the defense. *See infra* Point B.

As every judge to consider this case has ruled, this information management function falls on the administrative side of the line. *See infra* Point C. Moreover, Petitioners cannot prevail because they have failed to sustain their burden on two other

points that they also must establish. First, they have not even tried to prove a common law tradition of absolute immunity for this sort of information management function. *See infra* Point D. Second, they have not demonstrated that granting absolute immunity to information management decisions of this sort is necessary to advance the policy considerations underlying the protection. *See infra* Point E.

A. Absolute Prosecutorial Immunity Is the Exception, Reserved for Highly Limited Circumstances.

Section 1983, the statute authorizing this lawsuit, does not specify any immunities. *See* Pet'r 2 (quoting statute). Nevertheless, this Court has engrafted immunities onto the cause of action, based on the premise that Congress intended to preserve common law immunities that were settled in 1871, when it enacted § 1983. *See, e.g.*, *Tenney v. Brandhove*, 341 U.S. 367, 376 (1951).

Back then, *qualified* immunity was the norm for executive officials, just as it is the "general rule" now in § 1983 cases. *Butz v. Economou*, 438 U.S. 478, 508 (1978); *see Malley*, 475 U.S. at 340. Qualified immunity is a robust protection that bars any lawsuit against a public official unless the official "'violate[d] clearly established . . . constitutional rights of which a reasonable person would have known.'" *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) (citation omitted); *accord Buckley*, 509 U.S. at 268. "The presumption is that qualified rather than absolute immunity is sufficient to protect government officials in the exercise of their duties" while holding them ac-

countable for egregious misconduct. *Burns*, 500 U.S. at 486.

Only rarely has this Court concluded that tradition and policy require exceptional treatment in the form of absolute immunity, which shields an official from suit even if he intentionally and maliciously violated the law. The prosecutor "'seeking absolute immunity bears the burden of showing that such immunity is justified for the function in question.'" *Buckley*, 509 U.S. at 269 (quoting *Burns*, 500 U.S. at 486); *see* Pet'r 23 (acknowledging burden). This exception to the rule of qualified immunity is narrow. *Burns*, 500 U.S. at 495; *Buckley*, 509 U.S. at 269.

No one gets absolute immunity just by virtue of his job title. *See, e.g.*, *Imbler*, 424 U.S. at 421. This Court takes a "functional approach," which focuses on the "nature of the function performed, not the identity of the actor who performed it." *Buckley*, 509 U.S. at 269 (citations and internal quotation marks omitted). Absolute immunity shields a prosecutor only for a specific set of functions—activities he performs "when serving as an advocate in judicial proceedings." *Kalina*, 522 U.S. at 125; *see Buckley*, 509 U.S. at 273. This encompasses only decisions "intimately associated with the judicial phase of the criminal process," *Imbler*, 424 U.S. at 430, such as decisions to initiate a prosecution and decisions on how to try a case, *see Buckley*, 509 U.S. at 578. For any other function, including the functions a prosecutor performs "'in the role of an administrator or investigative officer,'" the default rule of qualified immunity applies. *Burns*, 500 U.S. at 491 (quoting *Im-*

bler, 424 U.S. at 431). In short, absolute immunity is not available unless "'any lesser degree of immunity could impair the *judicial process* itself.'" *Kalina*, 522 U.S. at 127 (quoting *Malley*, 475 U.S. at 342) (emphasis added).

In order to prevail, Petitioners have to prove more than just that the conduct falls on the advocacy side of the line, and that the very existence of a lawsuit would "impair the judicial process." *Id.* Petitioners also must prove two further propositions. First, they must demonstrate "a tradition of immunity comparable to the common-law immunity from malicious prosecution, which formed the basis for" the Court's decision to grant absolute immunity to a prosecutor's charging decisions and courtroom tactics. *Burns*, 500 U.S. at 493; *see Imbler*, 424 U.S. at 421; *Buckley*, 509 U.S. at 268-69. Second, they must also prove that the policy concerns underlying absolute immunity justify its application to the specific conduct challenged. *See Buckley*, 509 U.S. at 269; *Tower v. Glover*, 467 U.S. 914, 920 (1984). Petitioners strike out on all three points. But before demonstrating why, we address Petitioners' confusion over what conduct is being challenged.

B. The Claim Against Petitioners Concerns the Function of Implementing an Information Management System to Track Past Informant History, Not the Function of Training About What *Brady* Information to Turn Over to the Defense.

Petitioners' brief suffers from a disconnect so fundamental that it makes almost everything they say irrelevant. Their entire brief responds to an

imagined theory of liability that Mr. Goldstein has never pressed, and directs scarcely a word at the theory that he is pressing.

Mr. Goldstein is not trying to hold Petitioners vicariously liable for the trial tactics of the deputy who prosecuted him. He is not, for example, suing Petitioners because a line prosecutor made an informed *trial decision* not to turn over *Brady* information to the defense. Rather, Mr. Goldstein is suing Petitioners—managers, not line prosecutors—for their own decision not to develop any system for tracking deals with jailhouse informants and making that information available office-wide, a decision that meant that the trial deputy was never in a position to make the trial decision to disclose the exculpatory information to the defense.

The complaint repeatedly emphasizes that Petitioners decided *not "to create any system"* that would allow "the Deputy District Attorneys handling criminal cases to access information pertaining to the benefits provided to jailhouse informants." J.A. 45 (emphasis added); J.A. 69. It focuses on the *internal* distribution of information. J.A. 70; *see also* J.A. 51. This decision about internal distribution is the predicate for Mr. Goldstein's constitutional claim against Petitioners: that Petitioners had a constitutional obligation under *Giglio*, as chief administrators of the District Attorney's Office, to establish "procedures and regulations . . . to insure communications of all relevant information on each case to

every lawyer that deals with it." *Giglio*, 405 U.S. at 154.[2]

Mr. Goldstein has pressed this theory throughout the litigation. The first sentence of argument in his Court of Appeals brief, for example, frames the case as revolving around a claim "that [Petitioners] ran the District Attorney's Office in a way that prevented deputy district attorneys from accessing information about jailhouse informants." Resp. CA Br. 9. Petitioners were not confused about this below. They correctly characterized Mr. Goldstein's position (in the first sentence of their Summary of Argument, for example) as an accusation that Petitioners "*fail[ed] to set up a system* to disseminate to deputy district attorneys information about plea deals and other assistance being offered to" informants. Pet'r CA Br. 6 (emphasis added).

Before this Court, however, Petitioners present with an acute case of claim amnesia. One can scour Petitioners' brief and find nary a reference to "information management," "dissemination of information," or any other phrase that accu-

[2] The Government invites "the Court [to] resolve the case" by deciding whether *Giglio* articulates a constitutionally enforceable obligation. *See* U.S. Br. 18 & n.2. As Petitioners acknowledge, that would be inappropriate. *See* Pet'r 23. At this juncture, the Court must assume "that [the plaintiff's] allegations . . . allege constitutional violations for which § 1983 provides a remedy." *Buckley*, 509 U.S. at 261; *id.* at 274 n.5. This Court should reject the Government's invitation to address the merits of the underlying claim, when Petitioners have not yet raised the issue, the courts below did not address it, and Petitioners did not present the issue in their cert. petition or their merits brief. *See* Pet. App. 6.

rately reflects the correct theory of liability. Instead, at every turn, Petitioners mischaracterize Mr. Goldstein's theory as revolving around the "actions of a chief advocate or supervising prosecutor in making decisions concerning *policies and training* that dictate *the manner in which prosecutors comply with Brady*" at trial. Pet'r 11 (emphasis added). Virtually all Petitioners' amici follow suit.

Short of displaying the point in neon, Mr. Goldstein could not have been clearer that the claim in this case is not about the adequacy of training as to "the *manner in which individual prosecutors comply* with [*Brady*] obligations" in the course of prosecutions, Pet'r 26 (emphasis added), and has nothing to do with decisions any trial deputy or supervisor makes about "the manner in which cases will be prosecuted," Pet'r 11. *See* Cert. Opp. 9-12 (correcting Petitioners' mischaracterization). Indeed, training on *Brady* disclosures has no bearing on the claim asserted here. As far as the trial deputy who prosecuted Mr. Goldstein knew, there was no information to disclose. Petitioners could have enlisted Yale Kamisar to devise a state of the art *Brady* disclosure training—and recruited Alan Dershowitz to teach it and police compliance—and it still would not have affected the line prosecutor's conduct. The whole point of this claim is that the trial deputy was an unwitting accessory to a constitutional violation because his superiors did not establish an internal system that would *enable him to know* key information. Only the chief administrators were in a position to install a system to ensure that he did have the necessary information.

For simplicity, we refer to this central theory as the failure to install an "information management system." The alternative is to repeat the complaint's wordier formulation, that Petitioners "failed to create a *system*, failed to train and failed to supervise Deputy District Attorneys, *to provide Deputy District Attorneys . . . with information with regard to jailhouse informants*," and "failed to instruct [them] *to disseminate* [such information] *throughout the office*." J.A. 69-70 (emphasis added). Petitioners will protest that the shorthand "does not appear in the . . . complaint" or in the briefs quoted above. Cert. Reply 2. But what matters is the substance of the complaint—with its indisputable focus on an office-wide system for internal distribution of information—not the label used to describe it.

True, the complaint's more verbose locution faults Petitioners not just for "fail[ing] to install such a system" to manage information, but also for "fail[ing] to train Deputy District Attorneys to disseminate impeachment information" internally. J.A. 70. But the reference to training merely acknowledges that an information management system is useless unless the handlers who make the deals are directed to *enter historical information into it* and are trained on the mechanics of how to enter the information. That is nowhere near the same as the more expansive claim of faulty training and supervision on *trial tactics* that Petitioners attribute to Mr. Goldstein.[3]

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[3] The Court of Appeals understood the distinction. It correctly characterized the claim as premised on Petitioners' "obli-

In any event, "[p]laintiffs are masters of their complaints and remain so at the appellate stage of a litigation." *Webster v. Reproductive Health Servs.*, 492 U.S. 490, 512-13 (1989). Lest there be any further confusion, we explicitly disclaim any theory of liability premised on whether Petitioners adequately trained and supervised line prosecutors on their obligations to disclose *Brady* material to the defense—or any other trial decision. The theory of liability in this case is limited to an administrator's failure to establish (or, here, more specifically, the affirmative decision not to establish) even the most rudimentary system to record and disseminate *internally* handlers' deals with informants.

C. Under this Court's Precedents, a Managing Prosecutor's Information Management Function Is Administrative.

With the proper focus on the conduct challenged, the conclusion is evident: When the chief administrator of a prosecution office decides not to establish a repository of information for internal use, he is not advocating in court. He is directing an administrative function.

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gation of ensuring that information regarding jailhouse informants *was shared among prosecutors in their office*," Pet. App. 2 (emphasis added); *see also* Pet. App. 14, 15, and distinguished this claim from a claim about policies or training "regarding how to prosecute a particular category of cases," Pet. App. 15 n.3; *see id.* at 11-13.

1. This Court has never granted a prosecutor absolute immunity, except for charging decisions or trial judgments.

This Court's precedents furnish clear guidance on how to distinguish between an advocacy function and an administrative one. The paradigmatic example of an advocacy function that is covered by absolute immunity is the conduct challenged in *Imbler*, where this Court first addressed the notion of prosecutorial absolute immunity. The Court there held that a prosecutor was immune from a suit challenging three strategic decisions that the prosecutor made in the course of a case: (1) to initiate a prosecution; (2) to introduce false testimony at trial; and (3) to withhold exculpatory evidence from the defense throughout trial. 424 U.S. at 416.

Since *Imbler*, this Court has never granted a prosecutor absolute immunity for conduct other than "the initiation of a prosecution, the presentation of the state's case in court, or actions preparatory to these functions." *Buckley*, 509 U.S. at 278. It has held that any "duties . . . that do not relate to an advocate's preparation for the initiation of a prosecution or for judicial proceedings are not entitled to absolute immunity." *Id.* at 273. That is because the purpose of prosecutorial immunity is to ensure that a prosecutor will "exercise his best judgment both in deciding which suits to bring and in *conducting them in court*." *Imbler*, 424 U.S. at 424 (emphasis added); *see Butz*, 438 U.S. at 516-17. Lawsuits about conduct that does not relate directly to charging decisions,

courtroom presentations, or trial tactics do not implicate this concern, and do not "'impair the judicial process itself.'" *Kalina*, 522 U.S. at 127 (citation omitted).

A trio of cases—*Burns*, *Buckley*, and *Kalina*—illustrate how strictly this Court has delimited the class of prosecutorial conduct that qualifies as "intimately associated with the judicial phase of the criminal process." *Imbler*, 424 U.S. at 430.

The first case to etch the line was *Burns*. There the plaintiff challenged a function that prosecutors routinely perform and that they are especially qualified to perform: The prosecutor gave the police legal advice about interrogations. 500 U.S. at 482. Specifically, the advice was to interrogate a shooting suspect under hypnosis. *Id.* In a hypnotic state, the suspect confessed to the shooting. During a subsequent probable cause hearing, the prosecutor elicited testimony about the confession, but did not elicit testimony about the hypnosis. *Id.* at 482-83. The suspect filed a suit challenging both the prosecutor's legal advice and his courtroom presentation. *Id.* at 487.

This Court separately addressed each challenged activity. On the one hand, this Court held that the prosecutor's courtroom decision to elicit misleading testimony at a probable cause hearing was entitled to absolute immunity. Presenting testimony "clearly involves the prosecutor's 'role as an advocate for the State,' rather than his role as 'administrator or investigative officer.'" *Id.* at 491. On the other hand, the Court unanimously held, the prosecutor was not entitled to absolute immunity for his legal advice to the police. Even

though the challenged conduct yielded evidence that found its way into court, this Court held that giving the advice was not part of the prosecutor's function *as courtroom advocate*, and, therefore, was not "intimately associated with the judicial phase of the criminal process." *Id.* at 493.

This Court further chiseled the line between advocacy and other functions in *Buckley*. There, a plaintiff sued prosecutors for: (1) fabricating evidence in the course of a murder investigation, specifically, shopping around for expert testimony linking a boot-print at the crime scene to the plaintiff; and (2) making false statements at a news conference in order to "seriously impair[] the fairness of the judicial proceedings against an innocent man." 509 U.S. at 262.

This Court rejected absolute immunity for both functions. The prosecutors' efforts to secure a compliant expert "during the period before they convened a special grand jury," the Court held, did not "relate to an advocate's preparation for the initiation of a prosecution or for judicial proceedings." *Id.* at 273. Even though the prosecutor did present the evidence to the grand jury, and would most certainly have presented it to a jury, the Court held, "[a] prosecutor neither is, nor should consider himself to be, an advocate before he has probable cause to have anyone arrested." *Id.* at 274. Because the plaintiff "was not arrested . . . until 10 months after the grand jury . . . had finally indicted him," the Court held, "the prosecutors' conduct occurred well before they could properly claim to be acting as advocates." *Id.* at 275.

The Court unanimously reached the same conclusion about the prosecutor's press statements. *Id.* at 278. The Court acknowledged that "[s]tatements to the press may be an integral part of a prosecutor's job and they may serve a vital public function," and it took at face value the allegation that the prosecutor made those statements to enhance the prospects of winning before a jury. *Id.* But the Court rejected absolute immunity, because the function itself—holding a press conference—was not inherent to the prosecutor's conduct *as an advocate* before *the court*. *Id.*

The most recent case in the trio is *Kalina*. The plaintiff there sued a prosecutor for documents she filed to initiate a criminal prosecution against him. Two of those documents—an information charging the plaintiff with the crime and a motion for an arrest warrant—were unsworn. 522 U.S. at 129. The third—a "certification for determination of probable cause"—was a sworn statement presenting facts in support of the arrest warrant. *Id.*

This Court held that the filing of the two unsworn charging documents was protected by absolute immunity because that decision "involved the exercise of professional judgment" as an "advocate and was integral to the initiation of the prosecution." *Id.* at 130. However, the prosecutor's sworn statement attesting to facts to support those documents was not protected by absolute immunity. In so ruling, the Court acknowledged that this sworn document was intimate to a judicial proceeding. *Id.* at 130-31. In fact, the Court noted that "even the selection of the particular

facts to include in the certification . . . required the exercise of the judgment of the advocate." *Id.* at 130. But, the Court unanimously held, that was not enough, because "[t]estifying about facts is the function of the witness, not the lawyer." *Id.*

To summarize, distinguishing charging decisions and trial tactics from all other prosecutorial decisions, this Court has rejected absolute immunity where: (1) the conduct is not intimately connected to the prosecutor's function as a courtroom advocate; (2) the function (however intimate to a judicial proceeding) could have been performed by a non-prosecutor; or (3) the conduct preceded the initiation of criminal proceedings.

2. Establishing an information management system is an administrative function, not advocacy intimately connected to judicial proceedings.

The conduct challenged here—the decision not to establish an internal information management system and populate it with facts about informants—fails on all three grounds.

Remoteness from judicial proceeding. When Petitioners decided to forego implementing an information management system, they were not involving themselves in "the initiation of a prosecution," "the presentation of the state's case in court," or any other substantive aspect of a prosecution. *Buckley*, 509 U.S. at 278. They were not deciding whether to prosecute a case or series of cases. They were not engaged in the "professional evaluation of the evidence assembled by the police [or] appropriate preparation for its presentation at trial." *Id.* at 273. They were not even

setting standards on whether, and under what circumstances, line prosecutors should share information *with the defense*. *Compare Imbler*, 424 U.S. at 416; *see* Pet. App. 11. Just the opposite, they deprived trial deputies of the information they would need to make that legitimate trial judgment. Simply put, the decision challenged here was not advocacy and was certainly not "*intimately* associated with the judicial phase" of any particular criminal case. *Imbler*, 424 U.S. at 430 (emphasis added).

As the District Court and a unanimous panel of the Court of Appeals understood, the conduct challenged here was a judgment about whether to memorialize and disseminate internally the information employees need to do their jobs—and specifically, the information they need to comply with legal obligations. Managers of every sort of government agency or business enterprise grapple with those sorts of internal information-dissemination and compliance questions every day. Like ground-level decisionmakers in any government agency or business, line prosecutors have certain compliance obligations, such as the obligation to turn over to the defense exculpatory information about informants. Like any line decisionmaker, line prosecutors make independent judgments as to how to comply with these obligations. As in any other context, their decision is only as good as the information that is available to them. As in any business, the managers are the only ones who can make fundamental decisions as to how best to memorialize the information and make it available to those who need it. That is why agencies and businesses- including prosecu-

tors' offices—routinely appoint chief *information* officers, or at least specify who on the management team bears responsibility for information management tasks. *See* U.S. Br. 16 (noting that the *U.S. Attorney's Manual* requires managers to appoint a liaison to law enforcement agencies to ensure that *Brady* information flows properly). That internal *function* is administrative, whether the business is publishing or prosecution, and whether the information is *ultimately* used in service of advertising or advocacy.

The information management function here is less "intimate[]" to "the judicial phase of the criminal process," *Imbler*, 424 U.S. at 430, than was the prosecutor's advice in *Burns* about how to extract a confession for use in court; the prosecutor's decision in *Buckley* to shop around for the best expert to use in court and to taint the jury pool with public statements; and the prosecutor's attestation to facts in court papers in *Kalina*. Since these activities did not qualify for absolute immunity, the same must be doubly true of the establishment of an information system for internal use within a prosecutor's office.

Who can track. The only difference between the information management systems used in agencies or businesses and the system that Petitioners opted not to install is one of content—what information is being tracked. Even on that score, there is nothing inherently *prosecutorial*—and certainly nothing inherently *advocacy*-oriented—about a system to manage information about informants. For one thing, prosecutors can use such a repository of information for purposes unrelated

to advocating in court—for example, as part of their investigative evaluation of the strength of the evidence against prime suspects.

More importantly, law enforcement agencies of all sorts perform the same function. An apt illustration comes from an organization that Petitioner Van de Kamp himself heads: As Chair of the California Commission on the Fair Administration of Justice (CCFAJ), Mr. Van de Kamp presided over the issuance of a report that urges "*all police and other investigative agencies* [to] formulate policies and procedures to systematically collect any potential *Brady* material and . . . promptly deliver it to prosecutors." CCFAJ, *Report and Recommendations on Compliance with the Prosecutorial Duty to Disclose Exculpatory Evidence* at 16-17 (Mar. 6, 2008), *available at* http://www.ccfaj.org/rr-pros-official.html (emphasis added).

That police and other investigative agencies can, and do, develop the same sorts of information management systems demolishes Petitioners' bid for absolute immunity. This Court has repeatedly emphasized that an activity cannot qualify as a prosecutorial advocacy function if non-prosecutors can perform the same function. The theme was central, for example, when this Court denied absolute immunity both to a prosecutor's fabrication of evidence and to a prosecutor's submission of sworn testimony in a court document. As to the former context, this Court reasoned that "[w]hen a prosecutor performs the investigative functions normally performed by a detective or police officer," the prosecutor cannot get the benefit of absolute immunity that the police officer would not enjoy.

Buckley, 509 U.S. at 273-74. And as to the latter, the Court held that the prosecutor "performed an act that any competent witness might have performed." *Kalina*, 522 U.S. at 129-30.

The Government only underscores the point when it proclaims that it is "not aware of any United States Attorney's Office in the country that has established the database contemplated by" Mr. Goldstein. U.S. Br. 22. If all 90 of these chief prosecutors do not administer their own informant databases, it is not because they have all decided to roll the dice on *Brady* obligations; it is because the Department of Justice (unlike Petitioners here) has made the considered judgment to delegate the responsibility to *law enforcement* agencies—such as the FBI and the DEA—under its direct control. Executive Office for the U.S. Attorneys, U.S. Dep't of Justice, *United States Attorneys' Manual* § 9-5.100 (2006) (directing all "investigative agencies" to "ensure that prosecutors receive sufficient information to meet their obligations under *Giglio*," including "designat[ing] an appropriate official(s) to serve as the point(s) of contact" to guarantee the dissemination of *Brady* material to prosecutors); ACLU Br. § IV.A. (documenting extent of FBI record-keeping on informants). The FBI, for example, devised (and hired scores of employees to maintain) a sophisticated automated database to track and assess "the accuracy, credibility, and reliability of" 15,000 informants. FBI, FY 2008 Authorization and Budget Request to Congress 4-22 to 4-25 (2007), *available at* http://www.usdoj.gov/jmd/2008justification/office/33_01_justification.doc.

Timing. As a temporal matter, the information management decision challenged here was independent of any strategic decision in Mr. Goldstein's prosecution, and, indeed, predated the prosecution—and even the crime—by several years. The administrators of prosecution offices have been aware of their line prosecutors' *Brady* obligations since at least 1963. And at least since 1972, larger offices were aware of this Court's direction to establish "procedures and regulations . . . to insure communications of all relevant information" about informants. *Giglio*, 405 U.S. at 154. The grand jury that investigated Petitioners' management decisions found abuses dating back at least to 1976, three years before the crime that was pinned on Mr. Goldstein, J.A. 49, and Petitioners were fully aware of the abuses, J.A. 44.

If, as this Court held in *Buckley*, a prosecutor's decision to fabricate evidence was not immunized, because it was made long "before [prosecutors] ha[d] probable cause to have anyone arrested," then the same must be true here. 509 U.S. at 274. The time lag here was seven years, compared to the 10 months that was dispositive in *Buckley*. Here, as there, the challenged decision was "well before [Petitioners] could properly claim to be acting as advocates." *Id.* at 275.

To be sure, this Court has also held that absolute immunity can apply to decisions that are "preliminary to the initiation of prosecution and actions apart from the courtroom." *Id.* at 272 (citation and internal quotations omitted). But contrary to Petitioners' assertion, this Court was not suggesting that it does "no[t] . . . matter that the[]

[challenged] decisions are made . . . in advance of any particular prosecution." Pet'r 27.

The reference to "preliminary" activities is simply a shorthand for what the Court referred to as "*an advocate's preparation* for . . . judicial proceedings." *Buckley*, 509 U.S. at 273 (emphasis added). It was an acknowledgment that "almost every action taken in the courtroom requires some measure of out-of-court preparation." *Id.* at 283 (Kennedy, J., concurring in part and dissenting in part); *see Burns*, 500 U.S. at 495. As this Court has explained, this preparation "include[s] questions of whether to present a case to a grand jury, whether to file an information, whether and when to prosecute, whether to dismiss an indictment against particular defendants, which witnesses to call, and what other evidence to present." *Imbler*, 424 U.S. at 431 n.22. To qualify for absolute immunity, the "preparation" must still be "intimately associated with the judicial phase of the criminal process, *id.* at 430, as each of the foregoing preparatory acts are. The reference to "preparation" is not a license to "retrospectively describe[]" all conduct "as 'preparation' for a possible trial," *Buckley*, 509 U.S. at 276, and it surely did not override the holding, in the same case, that a decision that occurs "well before" the prosecution is not sufficiently intimate to the judicial function, *id.* at 275.

3. Petitioners' main effort to characterize the challenged conduct as advocacy fails, because Petitioners address the wrong conduct.

Petitioners offer almost no argument as to why the *development of an information management system* should be characterized as advocacy rather than an administrative function.

Instead, in keeping with their misplaced focus on the theory Mr. Goldstein has disclaimed, *see supra* at 15, Petitioners argue that an administrator's conduct in training, supervising, or promulgating policies *about how prosecutors behave in the courtroom* must be treated as advocacy. That is Petitioners' focus when they insist that a prosecutors' "policies" are "nothing more than a substitute for the personal involvement of a chief advocate or a supervising attorney *in each individual prosecution*." Pet'r 27 (emphasis added); *see also* U.S. Br. 21 (making same point). That is the theory they target when they liken "the actions of a chief advocate . . . in making decisions concerning policies and training that dictate the manner in which prosecutors comply with *Brady*" to an individual prosecutor's willful failure to comply with *Brady*. Pet'r 11.

Lower courts have wrestled with claims that a supervisor failed adequately to "supervise" or "train" line prosecutors about courtroom behavior or to promulgate policies about charging decisions or trial tactics.[4] Should this Court review such a

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[4] *Compare Carter v. City of Philadelphia*, 181 F.3d 339, 356-57 (3d Cir. 1999) (rejecting absolute immunity for claim alleg-

case, it will need to confront the argument Petitioners present here. But this is not such a case. Mr. Goldstein's claim is not that the managers failed to "train" trial deputies to comply with their obligation to turn over exculpatory evidence to the defense, but that their administrative decision made it impossible for even the most well trained and conscientious trial deputy to *know about* the exculpatory information they were obliged to turn over. Petitioners' hypothesized claim focuses directly on tactical decisions made at trial; the claim presented here does not.

4. Petitioners' remaining arguments for why the challenged conduct is advocacy also fail.

Because Petitioners train their sights on the wrong theory of liability, they almost never address whether decisions about information management should be immunized. The best we can

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ing "failure as administrators to establish training, supervision and discipline policies" on how to detect and discourage police perjury), *and Walker v. City of New York*, 974 F.2d 293, 301 (2d Cir. 1992) (sustaining claim that "district attorney[] [failed] to supervise or train [line prosecutors] on *Brady* and perjury issues," because the claim related to "management of the office" and not to the "quasi-judicial function" of "prosecuting a criminal matter"), *with Haynesworth v. Miller*, 820 F.2d 1245, 1268-70 (D.C. Cir. 1987) (a supervising prosecutor's general policy about whom to charge is as immune as a specific charging decision), *abrogated on other grounds, Hartman v. Moore*, 547 U.S. 250 (2006), *and Hamilton v. Daley*, 777 F.2d 1207, 1213 n.5 (7th Cir. 1985) ("Since absolute immunity protects prosecutorial decisions, supervision of the prosecutors who make these decisions is similarly immune.").

do is try to adapt a few of their misdirected arguments. Even as adapted, the arguments fail.

Impact on criminal cases. Petitioners' lead argument is that absolute immunity is warranted because the challenged "decisions . . . directly impact the prosecution of criminal cases," Pet'r 28, and any duty that was violated "arises *only* in the context of prosecution," Pet'r 26.

This Court long ago rejected the argument that prosecutors "are entitled to immunity because the injuries suffered by [the plaintiff] occurred during criminal proceedings." *Buckley*, 509 U.S. at 271. The Court explained that "the *Imbler* approach focuses on the conduct for which immunity is claimed, not on the harm that the conduct may have caused." *Id.* "The location of the injury . . . is irrelevant . . . to the question whether the conduct of a prosecutor is protected by absolute immunity." *Id.* at 272.

Thus, for example, in *Kalina*, the prosecutor executed the challenged certification for the explicit purpose of advocating to the court to issue an arrest warrant and begin the criminal prosecution. 522 U.S. at 120-21, 129-31. The Court even went out of its way to acknowledge that the prosecutor would have been within her advocacy function if she had simply "draft[ed] the certification" for *someone else's* signature. *Id.* at 130. Similarly, when a prosecutor fabricates evidence (as in *Buckley*) or gives legal advice on how to elicit a confession (as in *Burns*), the evidence could—and often will—ultimately "directly impact" the ensuing judicial proceeding. But in each of these cases, the ultimate impact on the trial did not

transform the conduct into advocacy. *See Buckley*, 509 U.S. at 262-63; *Burns*, 500 U.S. at 493-94; *Kalina*, 522 U.S. at 129-31. Nor did the fact that in each of these cases the duty violated "arises only in the context of prosecution" (which is true in most cases involving *prosecutorial* immunity). Pet'r 26.

Petitioners have conceded that "[i]t is easy to argue that an obligation to create and maintain an 'information management system', divorced from any discussion of when and how the information managed by that system is to be used, is nothing more than an administrative task, one that can be performed even by 'clerical staff.'" Cert. Reply 3. We could not agree more. But the embedded caveat does not hedge Petitioners' concession, for the point of this Court's functional approach is that analysis of the function *is supposed to be* "divorced from any discussion of when and how" the harm is inflicted or why the function is being performed.

Prosecutorial expertise. In their only argument that relates specifically to information management, Petitioners assert that the design of any information management system "requires an advocate's review and application of the governing law in the context of a criminal prosecution." Pet'r 29. A rudimentary tabulation of an informant's name, address, record, and deals is not an especially nuanced exercise. *See Grand Jury Report* at 113 (describing proposal for "recording only the minimum information, i.e., the informant's name, the Deputy District Attorney's name and the number of the case affected"). A workable system need not be any more complicated than the

rap sheet designed and maintained by police agencies without prosecutorial assistance. It does not take prosecutorial expertise to record this basic information. It requires the sort of organization and record-keeping skill that is within the bailiwick of any competent paralegal.

But even if a prosecutorial consult is required, that still does not make the conduct any more intimate to judicial proceedings. As an initial matter, Mr. Goldstein is not suing Petitioners for designing a database *improperly*. He is suing them for having no information management system at all—not an Oracle database, not an Excel spreadsheet, not a central ledger with hand-written entries, not even a Filofax of dog-eared Post-It Notes collected by Perry the paralegal . . . nothing. It does not require any special expertise as an advocate to appreciate that an office of over a thousand lawyers cannot comply with the obligation to turn over information about informants, unless *some* sort of system is in place to memorialize that information and make it available to end-users.

More to the point, it is not enough to say (as the Government does) that the design of a database requires "prosecutorial judgments," U.S. Br. 22, or that "the claims against petitioners 'arose only because of their roles as prosecutors,'" *id.* at 20 (quoting Pet. App. 14). By definition, any prosecutorial immunity case arises because of the defendant's role as a prosecutor, and much of what a prosecutor does requires "prosecutorial judgments." Even conduct that is "an integral part of a prosecutor's job," and that "serve[s] a vital function," *Buckley*, 509 U.S. at 278, can still

fall outside the limited rubric of "advocacy" that is "intimately associated with the judicial phase of the criminal process," *Imbler*, 424 U.S. at 430.

A prosecutor ordinarily is best suited to give legal advice to police about the permissibility of certain interrogation techniques. There is no disputing that the advice "requires application of the governing law in the context of a criminal prosecution." Pet'r 29. Yet, as this Court has held, the prosecutor is still not acting as an advocate when he performs that function. *See Burns*, 500 U.S. at 482-83, 496.

So, too, for information management. In any business, information management systems are typically designed by Information Technology specialists who consult with the substantive experts to understand the sorts of decisions that end-users will make in reliance on the information stored. A law firm cannot design a conflicts database, for example, without a practitioner's understanding of how lawyers use it to make critical decisions, and Amway's IT department would never design a database for tracking customer preferences without consulting management about how the sales staff will use the information. But just as no one would suggest that the administrator who oversees the conflicts database is practicing law, or that the administrator who devises the Amway database is selling face cream, it is wrong to say that the administrator who applies his prosecutorial expertise to the design of an informant database is engaged in advocacy.

Meaningful standards. Petitioners also protest that there is no "meaningful definition . . . nor

precise standards" for determining which "policies and training are necessarily 'administrative.'" Pet'r 31. When this Court decides how to deal with training and the promulgation of policies *for trial behavior*, it may well have to draw fine lines distinguishing policies and training on some subjects from policies and training on others. But here, there are no lines to draw. Management-level decisions on how to keep records and whether to create an internal system accessible to line prosecutors are *all* administrative.

Even if it were not as simple as that, Petitioners' argument about line-drawing difficulties only undermines their legal position. Petitioners seem to forget that it is their burden to prove that they are entitled to the exceptional protection of absolute immunity. *See Burns*, 500 U.S. at 486. "[I]f application of the principle is unclear the defendant simply loses," because absolute immunity must be rejected in favor of qualified immunity. *Buckley*, 509 U.S. at 281 (Scalia, J., concurring).

In any event, Petitioners only prove how workable this Court's advocacy/administrative line is with their examples of "clerical" conduct. Pet'r 32. "[M]aking witness lists" is obviously "preparatory to" trial and integral to the advocacy function. That conclusion does not change just because that activity—like many functions that are preludes to a courtroom presentation—can be characterized as "clerical," tedious, or dull. What about "taking notes"? Pet'r 32. That might be advocacy-related or not, depending upon the subject. If the prosecutor is taking notes of witness interviews in preparation for trial or scribbling down

quotes from a witness's trial testimony, she is obviously engaged in an advocacy function. But not if she is engaged in the investigative function of taking notes at the scene of an unsolved murder or of an interview with a job applicant.

Which brings us full circle to "keeping track of material subject to *Brady* disclosure." *Id.* That, too, is either advocacy-related or administrative, depending on who is doing the tracking, when, and why. It is clearly an advocacy function when the trial deputy, on the eve of trial, is "keeping track of" what information he has learned about his witnesses, with a view toward deciding what disclosures he is legally obliged to make. It is not an advocacy function when management, outside the context of any particular prosecution, creates a system to collect historical information on all informants for future reference in investigations and perhaps in some later prosecution that may or may not ever materialize. The two functions are as different from each other as Amway's corporate decision to track past customer choices is from a salesperson's decision of which customer to call next and what product to pitch.

Administrative conduct as advocacy. Finally, Petitioners launch a full frontal assault on this Court's precedent, when they argue that "even assuming [Petitioners'] conduct can be described as 'administrative,'" "there's no indication in this Court's decisions that . . . it necessarily falls outside the scope of absolute immunity." Pet'r 31. That is exactly what this Court's taxonomy means when it says that "[a] prosecutor's administrative duties . . . are not entitled to abso-

lute immunity." *Buckley*, 509 U.S. at 273. To hypothesize, as Petitioners do, "'administrative duties' that *do* 'relate to an advocate's preparation for the initiation of a prosecution for judicial proceedings,'" Pet'r 32 (emphasis in original), is like positing invertebrates that *do* have backbones. There is no such animal. By definition, it can be one or the other, but never both.

D. Petitioners Fail to Carry Their Burden of Establishing a Common Law Analog to Absolute Immunity for Information Management.

Petitioners do not deny that their bid for absolute immunity for their information management function must fail unless they prove "a tradition of immunity [for that conduct] comparable to the common-law immunity from malicious prosecution, which formed the basis for the decision in *Imbler*." *Burns*, 500 U.S. at 493; *see Malley*, 475 U.S. at 342 (stating that this Court has been unwilling to "read into [§ 1983] an absolute immunity for conduct which was only accorded qualified immunity in 1871"); *Burns*, 500 U.S. at 497 (Scalia, J., concurring in part and dissenting in part) ("While we have not thought a common-law tradition (as of 1871) to be a *sufficient* condition for absolute immunity under § 1983, we have thought it to be a *necessary* one.") (internal citations omitted; emphasis in original). Yet, they do not even try to ground their defense in common law precedents. That is because common law knew no immunity expansive enough to cover a decision on how to manage information.

Pre-1871 judicial immunity cases. The point of reference for discerning a common law tradition is the state of immunity law in 1871, when Congress passed § 1983. *See, e.g., Kalina*, 522 U.S. at 123; *Buckley*, 509 U.S. at 268. At the time, there was no immunity for prosecutors. *See Kalina*, 522 U.S. at 124 n.11. Most prosecutors were private practitioners hired by victims and their families. *See* Margaret Z. Johns, *Reconsidering Absolute Prosecutorial Immunity*, 2005 B.Y.U. L. Rev. 53, 108 (2005). Lawsuits against these prosecutors were ubiquitous. *See* Law Profs. Br. § IV (listing numerous cases). Public prosecutors, like private ones, enjoyed no immunity from suits for malicious prosecution, at least so far as appears from the scant opinions on the subject. *See Kalina*, 522 U.S. at 132 (Scalia, J., concurring); *Parker v. Huntington*, 68 Mass. (2 Gray) 124, 128 (1854). There was not a single decision on the books in 1871 that granted a prosecutor absolute immunity. *Burns*, 500 U.S. at 499 (Scalia, J., concurring in part and dissenting in part).

That is why, in conferring absolute immunity on prosecutors, this Court has analogized to other ancient forms of immunity. *See Imbler*, 424 U.S. at 422-23. Judicial immunity, in particular, is instructive here, because the limiting principle on judicial immunity in common law was the same as the limiting principle that controls this case. Judicial immunity was available only where a judge was "act[ing] judicially" when he performed the challenged act. *Tompkins v. Sands*, 8 Wend. 462,

469 (N.Y. 1832).[5] That inquiry is identical to the limiting principle in this case—the notion of being "intimately associated with judicial phase of the criminal process." *Imbler*, 434 U.S. at 430. So any limit on what it means to "act judicially" should limit the scope of prosecutorial immunity as well.

Common law courts in 1871 would not have stretched the concept of "acting judicially" to embrace the sort of record-keeping function involved in this case. Courts held that a judge "acts judicially" only "[w]hen the parties appear before him, and the cause is heard, [and] he renders judgment." *Tompkins*, 8 Wend. at 466. "[T]he touchstone" for determining whether an act was "judicial" "was the performance of the *function of resolving disputes between parties, or of authoritatively adjudicating private rights.*" *Burns*, 500 U.S. at 500 (Scalia, J., concurring) (emphasis added) (citing WEEKS, *supra*, at 214).[6]

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[5] *See Bradley v. Fisher*, 80 U.S. 335, 347 (1871) (common law "exempt[ed] judges . . . from liability in a civil action" only "for acts done by them" only "in the exercise of their *judicial functions*") (emphasis added); *Forrester v. White*, 484 U.S. 219, 227 (1988) (same); *Noxon v. Hill*, 84 Mass. (2 Allen) 215, 216-17 (1861); FLOYD R. MECHEM, A TREATISE ON THE LAW OF PUBLIC OFFICES AND OFFICERS 9 (1890); EDWARD P. WEEKS, THE DOCTRINE OF DAMNUM ABSQUE INJURIA 209-10 (1879).

[6] *See Butz*, 438 U.S. at 514 (absolute immunity is limited to those "performing adjudicatory functions"); *Forrester*, 484 U.S. at 227 ("resolving disputes between parties who have invoked the jurisdiction of a court" is "the paradigmatic judicial act"); *Supreme Court of Virginia v. Consumers Union of U.S., Inc.*, 446 U.S. 719, 731 (1980) (judicial immunity attaches only to an "act of adjudication").

In keeping with this limited definition of "acting judicially," the common law was replete with cases rejecting judicial immunity for claims that were about bad paperwork, faulty maintenance of information, and similar tasks. Cases found that judges could be held liable, for example, for "carelessness . . . in making out and issuing an execution [of judgment] which was irregular and invalid," *Noxon*, 84 Mass. at 216-17; entering a judgment earlier than allowed by statute, *see Briggs v. Wardell*, 10 Mass. 356, 358 (1813); altering the court's docket, *Garfield v. Douglass*, 22 Ill. 100, 102 (1859) (dictum); and failing to keep "accounts . . . in such manner as to show to what estates or parties the fund . . . belongs," *Disbrow v. Mills*, 62 N.Y. 604, 609 (1875). *See generally* Law Profs. Br. § III.C. In some cases, courts, including this Court, rejected immunity even for acts that, by today's standards, seem quite judicial indeed.[7] As this Court has pointed out, many acts by judges "have not . . . been regarded as judicial acts" "even though they may be essential to the very functioning of the courts." *Forrester*, 484 U.S. at 228.

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[7] *See, e.g., Ex Parte Virginia*, 100 U.S. 339 (1879) (rejecting absolute immunity against a claim that that a judge excluded African-American jurors); *Tompkins*, 8 Wend. at 467 (no immunity for a judge who "unjustly . . . prevented the plaintiff from appealing" a judgment by improperly refusing to approve the surety for an appeal bond); WEEKS, *supra*, at 219 (judges "[we]re liable," under common law, "if they refuse[d] to issue a summons to a person who lawfully demands it, or an execution on a judgment they have rendered, or to enter up a judgment rendered," or "to take security on issuing a writ of replevin, or security on appeal, or issuing an attachment without the statutory requisites") (citing numerous cases).

We have found not a single case before 1871 that applied absolute immunity outside a judge's core function of adjudicating disputes, much less to a function that looked anything like the record-keeping function at issue here.[8] But even if Petitioners could characterize some case that way, they still could not prove, as they must, that there was an established tradition of immunizing judges for such functions. *See Butz*, 438 U.S. at 508 (calling for evidence of "settled doctrine").

Since the sorts of record-keeping functions at issue here would not have been considered "acting judicially" when performed by judges, those same functions should not be considered "intimately associated with judicial phase of the criminal process," when performed by prosecutors. *Imbler*, 434 U.S. at 430.

Post-1871 prosecutorial immunity cases. In discerning the scope of prosecutorial immunity, this Court has also consulted cases that were decided in the several decades after 1871. *See id.* at 421. This body of common law provides even less support to Petitioners' position. "[T]he first case extending *any* form of prosecutorial immunity was decided some 25 years after the enactment of

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[8] A couple of *post*-1871 cases seem to apply immunity beyond a judge's core adjudicatory functions, though still not to information management functions. *See, e.g., Paulding County v. Scoggins*, 23 S.E. 845, 845 (Ga. 1895) (holding that where a judge has authority to make bridges and roads, he could not be held liable for gross errors in the contracts); *Kress v. State*, 65 Ind. 106, 106 (1878) (affording absolute immunity for the recording of a judgment). These outliers do not negate the settled rule, much less establish the opposite tradition.

§ 1983." *Burns*, 500 U.S. at 499 (Scalia, J., concurring); *see Imbler*, 424 U.S. at 409 (citing *Griffith v. Slinkard*, 44 N.E. 1001 (Ind. 1896), as the "first American case to address the question"). Well into the 1920s, the courts split over whether the immunity should be absolute or qualified. *See* Johns, *supra*, at 114-15.[9]

The courts that did grant prosecutors absolute immunity kept it limited. *E.g., Yaselli v. Goff*, 12 F.2d 396, 406 (2d Cir. 1926), *summarily aff'd*, 275 U.S. 503 (1927). In the first half of the 20th century, courts never extended prosecutorial absolute immunity to a prosecutor for anything other than malicious prosecution or courtroom behavior.[10] We have not found any case in that time frame that so much as suggests that absolute immunity could extend to a chief prosecutor's management function, much less to decisions about how to keep and disseminate information internally.

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[9] *Compare Leong Yau v. Carden*, 23 Haw. 362, 369 (1916) (holding that prosecutor is entitled only to qualified immunity), *and Buhner v. Reusse*, 175 N.W. 1005, 1006 (Minn. 1920) (holding no immunity where prosecutor acted with malice and without probable cause), *with Smith v. Parman*, 165 P. 663, 663 (Kan. 1917) (holding that prosecutor is entitled to absolute immunity), *and Kittler v. Kelsch*, 216 N.W. 898, 905 (N.D. 1927) (same).

[10] *Compare Yaselli*, 12 F.2d at 406 (absolute immunity for malicious prosecution); *Smith*, 165 P. at 663 (same); *Kittler*, 216 N.W. at 898 (same); *Watts v. Gerking*, 228 P. 135, 141 (Or. 1924) (on rehearing) (same); *and Griffith*, 44 N.E. at 1002 (absolute immunity for falsification of grand jury documents), *with Schneider v. Shepard*, 192 Mich. 82, 87-89 (1916) (no absolute immunity for authorizing a raid on a house).

E. Petitioners Fail to Carry Their Burden of Proving That Policy Considerations Demand Absolute Immunity for Information Management Functions.

With almost nothing to say about the information management claim in this case, and nothing at all to say about any common law basis for absolute immunity, Petitioners lavish most of their attention on various policy "considerations." Pet'r 16, 33-37. Petitioners seem to acknowledge that they cannot prevail without proving that policy considerations support absolute immunity. *See Butz*, 438 U.S. at 506. But they never acknowledge that these policy considerations, though necessary conditions, are not sufficient to establish absolute immunity. *See Buckley*, 509 U.S. at 278. As the Court has observed, "'we do not have a license to establish immunities from § 1983 actions in the interests of what we judge to be sound public policy.'" *Id.* (quoting *Tower*, 467 U.S. at 922-23).

Even if the Court did have such license, Petitioners' policy analysis fails. Their dire predictions will never materialize. And they are incorrect in asserting that mechanisms other than civil liability adequately deter the sorts of systemic misdeeds that are challenged here. *See generally* Innocence Project Br. § III (providing a thorough discussion of both sides of the policy balance).

1. Qualified immunity adequately protects chief administrators from suit for the conduct at issue here.

Assessing the potential dangers of denying absolute immunity here must begin with "'[t]he pre-

sumption . . . that qualified rather than absolute immunity is sufficient to protect government officials in the exercise of their duties.'" *Buckley*, 509 U.S. at 278 (quoting *Burns*, 500 U.S. at 486-87). The presumption is fair, because, "'[a]s the qualified immunity defense has evolved, it provides ample protection to all but the plainly incompetent or those who knowingly violate the law.'" *Burns*, 500 U.S. at 494-95 (quoting *Malley*, 475 U.S. at 341). Especially as fortified in the years since this Court decided *Imbler*, the protection of qualified immunity is "specifically designed to 'avoid excessive disruption of government and permit the resolution of many insubstantial claims on summary judgment.'" *Malley*, 475 U.S. at 341 (quoting *Harlow*, 457 U.S. at 818)); *see Burns*, 500 U.S. at 494 ("[T]he qualified immunity standard is today more protective of officials than it was at the time that *Imbler* was decided.").

This Court immunized prosecutors from claims of malicious prosecution and trial misconduct, because it feared that every prosecutor in any case could be a target of a suit for every charging decision and trial tactic. *See Imbler*, 424 U.S. at 424-25. But this Court has since made clear that the concern about litigation catnip is not some shibboleth that justifies absolute immunity whenever a criminal defendant sues a prosecutor. The dire predictions of a litigation frenzy did not carry the day, for example, when this Court weighed policy considerations in *Burns* and *Buckley*, with respect to a prosecutor's function of giving legal advice to police, *see Burns*, 500 U.S. at 495, and a prosecutor's fabrication of evidence and tainting of the jury pool, *see Buckley*, 509 U.S. at 278.

History has vindicated this Court's conclusion in those cases, for the predicted litigation frenzy never materialized. Petitioners' equally alarmist predictions are even less plausible here. One could easily imagine a flood of vexatious litigation challenging a prosecutor's public statements, and most any defendant could devise a theory that the prosecutor shopped around for the best evidence against him. But contrary to Petitioners' assertion, it is highly unlikely that allowing this lawsuit to proceed will invite "a flood of lawsuits" by criminal defendants challenging a manager's faulty information management decisions. Pet'r 37.

Unlike the sorts of claims that concerned this Court in *Imbler* (and even the sorts that did *not* concern the Court in *Buckley* and *Burns*), a lawsuit like this one could not be brought by just anyone with a complaint about being falsely accused (but never tried) or by just anyone who was tried and acquitted. Under the theory pressed in this case, a criminal defendant would not be able to bring a suit over a manager's information management function unless the stars align to satisfy all the following conditions: (1) the criminal defendant went to trial and was convicted; (2) that conviction was based largely on a specific informant's testimony; (3) the conviction was tainted by a trial deputy's failure to turn over *Brady* information tending to undermine the informant's testimony; (4) the trial deputy did not know that the *Brady* information existed; (5) the reason he did not know is that the chief administrator did not create any sort of information management system to get the relevant information in the trial

deputy's hands when he needed it; and (6) the *Brady* information was potentially dispositive. What is more, the lawsuit will be thrown out, unless the quondam criminal defendant (now plaintiff) can satisfy the further high threshold of demonstrating that (7) his conviction has been overturned; (8) he was not successfully retried and convicted; and (9) the wrongful conviction was caused by the chief prosecutor's information management decision. *See Heck v. Humphrey*, 512 U.S. 477, 484 (1994). It is hard to imagine any other scenario in which an information management decision like the one challenged here could lead to a lawsuit against a chief prosecutor.

Petitioners do not even try to conjure up other scenarios. The only way they can depict this case as presenting a "pervasive threat of vexatious and retaliatory suits" is by resorting to their mischaracterization of the claim, as a bid to hold chief administrators accountable for every sort of "alleged prosecutorial misconduct" at trial. Pet'r 33-34. But because the theory here is not about inadequate training or supervision of trial tactics, a denial of absolute immunity here will not mean (as Petitioners and the Government warn) that plaintiffs will be able to "simply retool their claims" against the trial deputies for garden-variety instances of prosecutorial misconduct "and assert that the alleged prosecutorial misconduct was the result of improper policy or training on the part of the chief advocate or a supervising prosecutor." Pet'r 34; *see* U.S. Br. 25.

For similar reasons, a lawsuit of this sort will not require "the courtroom prosecutors . . . to tes-

tify as to the nature and circumstances of the underlying prosecution and their various decisions in order to determine whether their actions were the result of policy or training." Pet'r 34. Since the theory of this claim does not depend upon any of the *trial deputy's* "decisions"—but only on the indisputable fact that he had no information to turn over—there is no danger that his thought process will be dissected in a trial proceeding. To be sure, the habeas corpus proceeding in which the wrongly convicted defendant establishes the *Brady* violation could entail consideration of the weight of the evidence in the original trial. But the § 1983 action cannot arise until after the violation is established, and the defendant is exonerated—at which point the specifics of the underlying prosecution are largely immaterial. *See Heck*, 512 U.S. at 484.

In any event, in its more recent cases, this Court has emphasized that the point of absolute immunity is not to advance "the interest in protecting the prosecutor from harassing litigation that would divert his time and attention from his official duties." *Kalina*, 522 U.S. at 125. The point is only to advance "the interest in enabling him to exercise independent judgment when 'deciding which suits to bring and in conducting them in court.'" *Id.* (citations omitted).

Petitioners are also wrong in assessing this latter point. "The specter of even defending such . . . lawsuits would" not, as they warn, "chill the prosecutorial discretion and judgment of chief prosecutors in making decisions about the manner in which cases are prosecuted," Pet'r 35, or other-

wise "impair vigorous enforcement of the law," Pet'r 12. That is, again, because the focus of this claim is not on "the manner in which cases are prosecuted"—and not even on the decision whether to turn information over to the defense.

Petitioners have failed even to hypothesize—and it is hard to fathom—the unwelcome chilling effect that could result from a rule that requires a manager to make more information available internally to trial deputies. The possibility that chief administrators, fearing civil liability, will require prosecutors to record "too much" *Brady* information in a database? The possibility that they might make the database too user-friendly or share the data too widely among line prosecutors? Maybe a prosecutor bent on securing unjust convictions at any cost will view these prospects as evils, but these are not the sorts of evils that absolute immunity is supposed to protect against.

"Absolute immunity . . . is strong medicine, justified only when the danger of officials' being deflected from the effective performance of their duties is very great." *Forrester*, 484 U.S. at 230 (internal quotation marks, brackets, and citation omitted). Petitioners have not demonstrated any such danger, much less that "'any lesser degree of immunity could impair the judicial process itself.'" *Kalina*, 522 U.S. at 127 (citation omitted).

2. A civil lawsuit is the only way to hold managers accountable for the sorts of conduct at issue here.

A central purpose of § 1983 is to "create an incentive for officials who may harbor doubts about the lawfulness of their intended actions to err on

the side of protecting citizens' constitutional rights." *Owen v. City of Independence*, 445 U.S. 622, 651-52 (1980); *see Hudson v. Michigan*, 547 U.S. 586, 596-98 (2006) (in declining to suppress evidence, Court notes that civil remedies suffice to hold prosecutors accountable). Many administrators at the helm of prosecution offices take their constitutional obligations seriously, and would honor these obligations even without the added threat of civil liability. But § 1983, as limited by qualified immunity, is not concerned with the scrupulous official, but with the one who is corrupt or "plainly incompetent." *Burns*, 500 U.S. at 494-95; *see Mitchell v. Forsyth*, 472 U.S. 511, 524 (1985). The concern is especially pronounced when it comes to chief prosecutors. They can inflict far more constitutional harm with a single systemic rule or decision—such as a decision that makes it impossible for line prosecutors to meet their constitutional obligations—than any rogue prosecutor can inflict in an individual case.

Petitioners' position gives the corrupt prosecutor carte blanche to subvert one of the most fundamental guarantees of fairness in the criminal trial—duping not just defense counsel, but judges, juries, and line prosecutors themselves—and to do so on a grand scale. Their position is that the chief administrators can never be held liable for any misconduct with respect to the management of information about informants—however egregious. Under Petitioners' rule, the head of an office would not be accountable for directing a functionary to destroy all records of informant deals because, "Trial deputies can't disclose what they can't find," or decreeing, "Any handler who shares

exculpatory information with a trial deputy will be fired."[11] *See* U.S. Br. 15-16 (arguing that such a direction should be immunized); Innocence Project Br. § III (listing other examples).

The ramifications for innocent criminal defendants are potentially pervasive and disastrous—far more disastrous than the misdeed of an isolated prosecutor in a particular case. We will never know how many other Thomas Goldsteins fell victim to Petitioners' deliberate decision to keep line prosecutors in the dark. Some never learned the truth about the invalidity of their convictions, possibly because they lacked Mr. Goldstein's perseverance and intellect. The only effective way to guard against this sort of pervasive injustice is to hold the public officials who make such egregiously wrong and far-reaching systemic decisions accountable for the consequences of those decisions, on the rare occasions when they are caught. And the only effective way to do that is to preserve a civil remedy for victims of such misconduct.

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[11] The conduct alleged in this case is not far from these devious statements. The complaint contemplates that Mr. Goldstein could prove that Petitioners "purposely . . . failed to install [an information management] system . . . *in order to prevent* Deputy District Attorneys . . . from having access to impeachment information." J.A. 46 (emphasis added). Discovery could uncover explicit statements by Petitioners of antipathy toward the prospect of turning over *Brady* information. In fact, the complaint recounts that the grand jury investigating the jailhouse informant scandal had documented how this sort of antipathy to constitutional rights did motivate administrators in the Los Angeles District Attorney's Office. J.A. 49-50.

Contrary to Petitioners' assertion, there are no other "checks" that "provide ample deterrence" for the sort of conduct challenged here. Pet'r 36-37. First, "the criminal justice system itself" is no effective deterrent. Pet'r 36. The very nature of the decision alleged here—the decision not to create any repository of information about informant deals—makes it unlikely that evidence of a *Brady* violation will ever materialize. *See Mitchell*, 472 U.S. at 522 (denying absolute immunity to attorney general for national security decisions, in part because "it is far more likely that actual abuses will go uncovered than that fancied abuses will give rise to unfounded and burdensome litigation"). But when the stray violation does come to light, a lone judge considering a collateral attack on a specific conviction has neither the power nor the perspective to remedy the systemic problem.

Second, "professional regulation, and . . . criminal liability" will not be effective deterrents. Pet'r 36. The decision not to set up an information management system—as grievous as it may be—is not a criminal act. And if a chief administrator's bad management is a violation of the Code of Ethics (a questionable proposition), it is not one that any disciplinary authority is likely to punish.

Finally, the only entity that is even less likely to deter a chief administrator from making the sort of decision Petitioners made here is the electorate. Pet'r 36. Petitioners do not cite a single instance in which voters have ever punished a prosecutor at the polls for being too zealous in putting criminals behind bars, much less for failing to keep the sorts of records that might better

enable a defense attorney to put an accused criminal back on the streets.

Like the attorney general engaged in secret national security activities, the chief prosecutor engaged in the sorts of sub rosa decisions challenged here is subject to no "built-in restraints." *Mitchell*, 472 U.S. at 523 & n.7 ("criminal prosecution and impeachment . . . would be of dubious value for deterring all but the most flagrant constitutional violations" by the attorney general). This case illustrates just how ineffective any of these purported deterrents are. Mr. Goldstein spent 24 years in prison. His habeas corpus petition restored his freedom, but did not compensate him for the years he lost. The managers who made the systemic decisions that put an innocent man behind bars—and risked the same fate for countless others—were fully aware of the abuses and deliberately made an administrative decision that would let the abuses thrive. They were undeterred by the prospect of disciplinary action or a voter uprising, and have not been held to account in any other way. Civil liability is the only way to hold these officials accountable or to deter others who knowingly and systematically violate the rights of innocent defendants in the same way.

CONCLUSION

For the foregoing reasons, this Court should affirm the order denying Petitioners' motion to dismiss.

Respectfully submitted,

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REPLY BRIEF

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JOHN VAN DE KAMP and CURT LIVESAY,

Petitioners,

v.

THOMAS LEE GOLDSTEIN,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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INTRODUCTION

In the appellate equivalent of destroying a village in an attempt to save it, respondent Goldstein's brief expressly abandons any substantive theory of liability against petitioners Van de Kamp and Livesay. While the complaint contains broad-based allegations against petitioners' purported failure to implement policies and training concerning compliance with *Brady v. Maryland*, 373 U.S. 83 (1963) in general, and *Giglio v. United States*, 405 U.S. 150 (1972) in particular, as well as regulate the use of jailhouse informants as witnesses, these detailed allegations are now dismissed as simply a "more verbose locution (Brief for Respondent ["Resp. Brief"] at 19) of the semantically sanitized claim concerning "information management" that respondent has coined for the first time in this court.

Respondent has to reduce his claim to one concerning "information management" because the reality is, as noted in petitioners' brief ("Pet. Brief"), there is no way to distinguish the decisions of a chief prosecutor or supervising prosecutor concerning the manner in which individual prosecutors will comply with the prosecution's overall obligations under *Brady* and *Giglio* through implementation of policies and training, from the direct participation of chief prosecutors and supervising prosecutors in individual cases. The decisions in each instance are intimately related to the prosecutorial function and hence are shielded by absolute immunity.

The entire premise of respondent's artificial construct of a claim based upon "information management" is to divorce the information "managed" from any context. It ignores the fact that the decision to implement such a system at all necessarily encompasses a decision as to how and in what manner a particular prosecutorial office and individual prosecutors will comply with *Brady* and *Giglio*. That decision necessarily requires prosecutorial judgment. Respondent consciously separates the information that forms the basis of his claim from the sole function for which it is collected and disseminated, for the all too clear reason that upon any reflection that function is necessarily prosecutorial in nature.

The mischief in respondent's thesis and semantic gamesmanship is that at bottom, virtually all prosecutorial activities could be characterized as "information management." Maintenance of witness lists, evidence, presentation of testimony, is all "information management" of a sort. Without a doubt, the specific (and dubious) theory that respondent asserts here – that large prosecutorial offices must, as a matter of constitutional mandate, necessarily enact some sort of centralized database and assure dissemination of information in order to comply with *Brady* and *Giglio* – would itself spawn hundreds, perhaps even thousands, of lawsuits against chief advocates and supervising prosecutors. Prosecutorial agencies throughout the country would be subjected to litigation to determine whether they are of such a

size so as to "require" implementation of such a system.

Even worse, the potential number of lawsuits premised on virtually any conduct that can be characterized as "information management" is almost limitless. Chief advocates and supervising prosecutors will be subject to potential liability stemming from the multitude of "information" based decisions that individual prosecutors make in the course of criminal prosecutions. The threat of entanglement in such litigation – chief advocates and supervising prosecutors as defendants and frontline prosecutors as indispensable witnesses – will necessarily chill the independent judgment of both and burden the judicial process. As this Court noted in *Imbler v. Pachtman*, 424 U.S. 409 (1976) and its progeny, it is precisely these concerns that form the basis for common law prosecutorial immunity, and similarly requires its application to section 1983 actions.

This Court has repeatedly reaffirmed *Imbler's* holding that these common law-based policy considerations necessitate absolute immunity for those performing prosecutorial functions. Chief advocates and supervising prosecutors necessarily perform a prosecutorial function in making decisions concerning the manner in which individual prosecutors within the office will comply with obligations under *Brady* and *Giglio*, through the implementation of policy and training. Prosecutorial decisions that directly impact every prosecution in the office are no different from decisions made with respect to a particular

prosecution. Such decisions must necessarily be protected by absolute immunity.

ARGUMENT

CHIEF ADVOCATES AND SUPERVISING PROSECUTORS PERFORM A PROSECUTORIAL FUNCTION CLOSELY RELATED TO THE JUDICIAL PROCESS IN MAKING DECISIONS ON POLICY AND TRAINING CONCERNING THE MANNER IN WHICH PROSECUTORS IN ALL CASES COMPLY WITH *BRADY V. MARYLAND* AND *GIGLIO V. UNITED STATES*.

A. The Decisions Of Chief Advocates And Supervising Attorneys Concerning The Manner In Which Prosecutors Will Comply With *Brady* And *Giglio* Are Necessarily Prosecutorial In Nature.

1. Respondent's rhetorical slight of hand in casting his claim as one based on "information management," cannot disguise the fact that his claim is based on petitioners' decisions concerning the manner in which prosecutors will comply with the obligations set forth in *Brady* and *Giglio*.

Much as Captain Renault is "shocked" to find gambling at Rick's in *Casablanca*, respondent feigns astonishment that petitioners – relying of all things on the allegations of the complaint – would characterize his claim as challenging petitioners' decisions

concerning policy and training directing the manner in which prosecutors would comply with *Brady* and *Giglio*. Resp. Brief 12, 18-19. Instead, he claims, he is asserting nothing more than a claim based upon "information management," a term which respondent is forced to admit he uses for the first time in this Court, notwithstanding its purported centrality to the lawsuit. Resp. Brief 19.

In this effort to reduce this case to the utmost generality, respondent therefore discards what is apparently perceived as the more troublesome allegations of the claims in his complaint concerning general training with respect to compliance with *Brady* and *Giglio* in the context of jailhouse informants, and the wholesale assault on the use of such witnesses at all. *See* Resp. Brief 20; JA 69-70; TR 71 at 39; AER 51-52.

This tactical decision cannot disguise the fact that at bottom, plaintiff's claims still remain premised upon prosecutorial decisions concerning compliance with *Brady* and *Giglio*. Whatever efforts plaintiff now expends to make this case about nothing other than merely data collection, the Ninth Circuit did not view it so. The court repeatedly characterizes respondent's claims as attacking the failure to develop policies and provide adequate training on sharing information regarding jailhouse informants – not simply collecting a database. *See* Appendix to Pet. Cert. ("App.") 11 [describing plaintiff's "theory of liability" as "alleged failure to develop a policy of sharing information regarding jailhouse informants

within the district attorney's office . . . failure to provide adequate training and supervision on this issue"]; App. 15 [noting that the allegations against petitioners "involve their failure to promulgate policies regarding the sharing of information relating to informants and their failure to adequately train and supervise deputy district attorneys on that subject. . . ."].

The Ninth Circuit plainly did not base its decision on any determination that petitioners' actions simply concerned "information management." Rather, it opined that general guidelines applicable to all cases, as opposed to "a particular case or even a particular category of cases," constitutes administrative as opposed to prosecutorial conduct. App. 15. As petitioners have explained, the Ninth Circuit's analysis in this regard is incorrect (Pet. Brief 26-30), but it does not resemble the "information management" theory that respondent now posits here.

As presented, respondent's "information management" claim is squarely at odds with the "functional approach" to prosecutorial immunity that this Court has uniformly applied. This is because respondent divorces the information from the only function for which it is gathered, and indeed turns a blind eye to the nature of the information itself. This is prosecutorial information that is collected for a prosecutorial purpose – compliance with *Giglio* and *Brady*. The decision whether or not to implement such a system requires the exercise of prosecutorial judgment, an understanding of the governing law coupled with a

pragmatic understanding of its application to the prosecutorial process.

Virtually any type of information could be said to be capable of being collected by "anybody," but petitioners are not being sued for a mere failure to collect information. Rather, they have been sued for allegedly failing to make certain that particular information is employed in the prosecution of cases. Police agencies may collect information that a prosecutor subsequently determines is subject to *Brady* disclosure, but it is the prosecution, not the police that makes the evaluation and upon whom the *Brady* obligation rests.

Obviously, mere existence of a database means nothing unless someone has made a determination as to what constitutes the relevant data, and, more critically, directs that it be used for a particular purpose. Even respondent reluctantly acknowledges that merely collecting the information would not be enough unless there was some kind of policy and training directing that it be used. Resp. Brief 19. This concession makes it clear that for all of respondent's posturing, at bottom, petitioners are being sued not for failing to implement some sort of "information management" system, but for decisions concerning how their prosecutorial agency would comply with *Brady* and *Giglio*.

In allegedly deciding not to create the centralized database respondent urges here, petitioners necessarily elected to pursue other policies to satisfy *Giglio*

and *Brady*. These could include, for example, relying on prosecutors utilizing jailhouse informants or other witnesses with charges pending to contact the prosecuting attorneys in the other case, or if uncertain as to the status of a witness, check the central criminal docket to see if there were pending criminal charges against the witness and then contact the prosecuting attorney. These policies may be adequate or inadequate in a particular case, but they represent decisions concerning the manner in which prosecutors will fulfill their *Brady* and *Giglio* obligations. As we discuss, such decisions are necessarily prosecutorial in nature and inextricably tied to the prosecution of cases.

2. Decisions concerning policy and training regarding compliance with *Brady* and *Giglio* are closely related to the judicial process and fall squarely within the prosecutorial function.

The artificial nature of respondent's purported claim based upon "information management" is revealed by the absence of any meaningful discussion of *Giglio* in respondent's brief. Review of *Giglio* underscores the prosecutorial nature of the conduct attributed to petitioners here.

In *Giglio*, the issue before the court was whether the criminal defendant's due process rights under *Brady* were violated when the prosecution failed to disclose that promises have been made to prosecution

witnesses whose testimony was central to the case. *Giglio*, 405 U.S. at 150-151. The central question was whether the fact that the Assistant United States Attorney who was prosecuting the defendant was unaware of any promise made to the key witness by another attorney in the office, made a difference. The Court held that it did not, emphasizing that "(t)he prosecutor's office is an entity and as such it is spokesman for the Government. A promise made by one attorney must be attributed, for these purposes, to the Government." *Id.* at 154.

The Court acknowledged that imputation of one attorney's promise to the entire office placed a burden on large prosecutorial offices if they wished to avoid reversals based on a failure to disclose such promises. *Ibid.* It suggested that "procedures and regulations can be established to carry that burden and to insure communication of all relevant information on each case to every lawyer who deals with it." *Ibid.* As several amici curiae note, the Court at most suggested a prophylactic framework to address the "burden", but did not impose a constitutional mandate of a centralized data base of the sort respondent urges here. *See* Brief of Amicus Curiae Cook County at 24-26; Brief for United States at 18-20; Brief of the National Association of Counties, etc. at 15-16.

The entire analytical underpinning of *Giglio* was that a prosecutorial agency functions as a whole with respect to complying with *Brady*, in the context of exculpatory impeachment evidence concerning prosecution witnesses. The focus on the "prosecutor's

office" as "an entity" repudiates respondent's narrow attempt to focus absolute immunity solely on the individual attorney prosecuting a particular case. The recognition that the prosecutorial agency has a role as an "entity" with respect to compliance with *Brady* in this regard, necessarily comprehends that decisions concerning that role must be prosecutorial in nature.

The reality is policy and training dictate the manner in which prosecutors will comply with their obligations under *Brady* and *Giglio*. Making a decision concerning the substance of that policy and training, whether it includes collection of a database or other procedures, is a task that can only be performed by a chief prosecutor or a supervising prosecutor in his or her role as an advocate of the State. It requires professional judgment, an understanding and application of the governing law coupled with knowledge of the prosecutorial process. The ultimate decision as to how prosecutors will comply with *Brady* and *Giglio*, and whether policies are sufficient under the governing law, is a determination that can only rest in the hands of a chief advocate or a supervising prosecutor exercising prosecutorial judgment. The ultimate decision never rests in the hands of a mere low-level "administrator."

Indeed, in this regard, respondent's analogy to the conflicts system at a law firm (Resp. Brief 37) is apt, but not for the reasons he urges. The person who merely inputs data, or the administrator that executes an attorney's decision to enact a conflict system

may not be "practicing law," but the attorney who directs creation and use of the system as a matter of professional responsibility and who exercises professional judgment as to whether it meets professional obligations most assuredly is. Similarly, chief advocates and supervising prosecutors who make decisions concerning the manner in which prosecutors fulfill their obligations under *Brady* and *Giglio*, whether by assessing what constitutes information falling within the obligation to disclose and directing that particular information be disclosed in a particular manner, inevitably act as prosecutors and advocates of the State. That function is not traditionally performed, and cannot be performed, by someone else. Cf. *Buckley v. Fitzsimmons*, 509 U.S. 259, 273 (1993) (no absolute immunity for fact investigation normally performed by police); *Kalina v. Fletcher*, 522 U.S. 118, 130 (1997) (acting as complaining witness not subject to absolute immunity because task could be, and normally was, performed by others); *see* Resp. Brief 27.)

Respondent contends that decisions concerning policy and training regarding *Brady* and *Giglio* cannot be closely related to the judicial process or the prosecutorial function, because such decisions were made prior to and without regard to his (or any other) particular prosecution. Resp. Brief 20-30. But contrary to respondent's argument, in *Buckley*, this Court did not purport to set a bright-line rule that all pre-trial or even pre-filing conduct fell outside the scope of prosecutorial immunity. To the contrary, as

petitioners noted, the court reaffirmed its "functional approach" to prosecutorial immunity and declined to set a bright-line standard delineating a particular time frame in which decisions become closely related to the judicial process. Pet. Brief at 20, citing *Buckley*, 509 U.S. at 272-273. The court underscored that "acts undertaken by a prosecutor in preparing for the initiation of judicial proceedings or for trial, and which occur in the course of his role as an advocate for the State, are entitled to the protections of absolute immunity." *Ibid.* To be sure, the court noted that with respect to the investigative conduct at issue there, it could not be said to have been undertaken in the "role of an advocate," because at the time it occurred there had not even been a determination of probable cause to arrest, let alone a proceeding in which the attorney could serve as an "advocate." *Id.* at 273. But again, the court's inquiry was focused on the nature of the act at issue – fact investigation.

Here, the conduct ascribed to petitioners is necessarily prosecutorial in nature and closely related to the judicial process. First, as this Court held in *Imbler*, decisions concerning whether particular information falls within *Brady* are necessarily prosecutorial in nature and thus fall within absolute immunity. *Imbler*, 424 U.S. at 431 n.34; *Kalina v. Fletcher*, 522 U.S. 118, 124 (1997); *Burns v. Reed*, 500 U.S. 478, 486 (1991). As noted, the decisions attributed to petitioners squarely concern compliance with *Giglio* and *Brady*. Indeed, their decisions have no relevance other than in the advocacy context of a

criminal prosecution. Their conduct can *only* relate to a criminal prosecution.

Nor, analytically, does it matter that these decisions are made in advance via policy and training in lieu of having petitioners direct the same conduct in each individual case. Are chief prosecutors and supervising prosecutors required, with respect to each newly filed case, to send a memo directing compliance with policy and training in order to assure that they are entitled to absolute immunity because they are now personally involved in prosecuting a particular case?

The time frame in which the decision is made simply cannot, in a vacuum, be dispositive of when a particular act is taken in a prosecutor's role as an advocate and closely related to the judicial process. For example, the Los Angeles County District Attorney's internal regulations now sharply limit use of jailhouse informant testimony, requiring that it only be used if there is strong corroborating evidence and only with advanced approval. *See* California Commission on the Fair Administration of Justice, *Report and Recommendation on Use of Jailhouse Informants* at 3 *available at* http://www.ccfaj.org/documents/reports/jailhouse/official/Official%20Report.pdf. Thus, the District Attorney is quite literally dictating the circumstances under which a particular witness may be called and the way evidence will be presented in court, essentially supplanting individual discretion on the part of the particular district attorney prosecuting the case in the courtroom. Other prosecutorial agencies could

go even further and entirely ban the use of such informants. As petitioners have noted (Pet. Brief 27), it is difficult to comprehend conduct that is more closely related to the prosecution of cases than dictating the witnesses that will appear in court and the nature of the evidence that will be presented.

By their very nature, decisions concerning policy and training with respect to *Giglio* and *Brady* only have relevance to the prosecutorial function. The rights assured by *Giglio* and *Brady* arise only where there is a criminal prosecution and the policies themselves can *only* act on the prosecutor at the time of prosecution. Because these decisions are closely related to the judicial process and were taken by petitioners in their role as advocates for the State, they are necessarily shielded by absolute immunity.

B. Absolute Immunity For Decisions Concerning Policy And Training With Respect To Exculpatory Evidence Under *Brady* And *Giglio* Is Consistent With The Common Law Protection Of The Prosecutorial Function.

Respondent contends that there is no common law counterpart to the "information management" claim based on "record-keeping" that they assert here, and that hence, petitioners cannot establish entitlement to absolute immunity. Resp. Brief 40-42. This contention too, rests on respondent's artificially crabbed characterization of his claim and does not withstand scrutiny. As a threshold matter, the Court,

consistent with its view that absolute immunity protects the prosecutorial function not a particular office, has not declined application of absolute immunity simply because a particular claim or form of prosecution did not exist at common law in 1871. Hence, in *Butz v. Economou*, 438 U.S. 478, 515 (1978), the court held that agency counsel prosecuting administrative proceedings were entitled to absolute immunity under *Imbler* because those proceedings were functionally equivalent to criminal prosecution. Thus, the question is whether the conduct attributed to petitioners is analogous to the prosecutorial conduct that fell within the scope of immunity at common law as reflected in this Court's "functional approach." As previously noted, it undoubtedly does. It is for this reason that respondent's discussion of pre- and post-1871 cases concerning the purported liability of judges for "information based" or "record-keeping" errors unrelated to deciding cases are inapposite.[1] As the court observed in *Imbler*, decisions

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[1] Respondent, as well as several amici also cite pre- and post-1871 cases purporting to establish the absence of prosecutorial immunity in the United States during those time periods. Resp. Brief 41-45; Brief Amici Curiae of Law Professors in Support of Respondent 33 n.14; Brief of the Constitutional Accountability Center as Amicus Curiae 12-13. The bulk of the cases do not involve public prosecutions, but rather private prosecutions, or civil actions in which judicial process is invoked to preserve property or restrain a debtor. *See, e.g., Warfield v. Campbell*, 35 Ala. 749 (1859) [writ of *capias* ad *satisfaciendum*]; *Burnap v. Marsh*, 13 Ill. 535 (1852) [writ of *no exeat*]. As the Court noted in *Imbler*, 424, U.S. at 420 n.18, *Parker v. Huntington*, 68 Mass. 124 (1854), the case cited as demonstrating the

(Continued on following page)

concerning exculpatory evidence under *Brady* necessarily fall within the scope of common law-based prosecutorial immunity. *Imbler*, 424 U.S. at 431 n.34; *Kalina*, 522 U.S. at 124. These decisions are no different if they are made in advance through policy and training as to every case prosecuted. They remain prosecutorial in function, and as we discuss below, recognition of absolute immunity for such decisions is supported by the very policy reasons which informed application of the immunity at common law.

C. Absolute Immunity Is Essential To Assure The Proper Functioning Of The Judicial Process As Well As Independent And Vigorous Exercise Of Prosecutorial Judgment.

1. Chief advocates and supervising attorneys will be subject to overwhelming exposure to vexatious claims.

As petitioners explained (Pet. Brief at 33), this Court has recognized that the adversarial nature of criminal proceedings inevitably spawns a concrete threat of vexatious and retaliatory suits against prosecutors. Petitioners noted this threat was particularly acute with respect to chief prosecutors and

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absence of prosecutorial immunity at common law in 1871, involves the elements of a malicious prosecution cause of action rather than the immunity of a prosecutor. As the Court further noted, *Leong Yau v. Carden*, 23 Haw. 362 (1916) represented the minority view. *Id.* at 422 n.19.

supervising prosecutors because, by virtue of their prosecutorial duties, they are in charge of the prosecution of hundreds, and at times even tens of thousands of cases within a particular jurisdiction. *Ibid.* at 34. *See* Amicus Curiae Brief of Los Angeles County District Attorney on Behalf of Los Angeles County at 2 [noting office prosecutes 60,000 felonies and 200,000 misdemeanors a year]; Brief of Amicus Curiae City of New York at 4, n.2 [New York County District Attorney's Office prosecutes 100,000 criminal cases annually]. Thus, chief and supervising prosecutors will be the inevitable targets of artfully pleaded claims that wrongful convictions or unsuccessful prosecutions were the result of some policy or improper training – some failure of "information management" – and be subjected to potential liability where the courtroom prosecutor would be immune. Under such circumstances, both the chief and supervising prosecutors, as well as the courtroom prosecutor would face the prospect of entanglement in litigation – the former as defendants, the latter as a witness – which would deter the very sort of independent prosecutorial decision-making that absolute immunity was designed to protect.

In response, respondent can do no more than artificially parse his claim as excruciatingly narrow while, at the same time, ignoring the broad practical implications of his "information management" theory.

First, respondent argues there is no need for absolute immunity here because there is limited exposure given that under *Heck v. Humphrey*, 512

U.S. 477 (1994), a potential plaintiff must first successfully challenge his conviction before filing suit and, in any event, few claims would have the precise factual basis he asserts here. Resp. Brief 49. As a threshold matter, this Court has emphasized it is the threat of malicious prosecution actions that necessitates absolute prosecutorial immunity. *Imbler*, 424 U.S. at 423-425. *Heck's* requirement of a successful attack on a criminal conviction as a prerequisite to a civil rights suit is, as this Court noted, simply analogous to the requirement in a malicious prosecution claim that the plaintiff establish that he or she prevailed in the underlying action. *Heck*, 504 U.S. at 484-87. Thus, *Heck* offers no more protection from potential liability than the prevailing party requirement in a malicious prosecution claim – a requirement which, as this Court recognized in *Imbler*, was insufficient to adequately protect prosecutorial decisionmaking and the judicial process so as to eliminate the need for absolute immunity.

Second, respondent asserts that his particular claim – an "information management" based claim arising from use of a jailhouse informant, is unlikely to recur. Resp. Brief 48-49. This seems squarely at odds with the position taken by amici filings in support of respondent, to the effect that the use of jailhouse informants and failure to provide *Brady* and *Giglio* information with respect to such informants is a widespread problem. Brief Amicus Curiae of the American Civil Liberties Union, et al. 10-14.

Respondent also ignores the nature of the very claim that he asserts here – dubious that it is – that *Brady* and *Giglio* somehow create an affirmative duty on prosecutorial offices of a certain size to maintain a central database concerning jailhouse informants and arrangements made with them with respect to cooperation in a prosecution to assure dissemination of the information to courtroom prosecutors. It is no stretch of reason to assume that this newly minted theory will spawn countless suits seeking to adjudicate whether a particular prosecutorial jurisdiction is large enough to "require" such a centralized database. Quite literally, the question will be litigated on a jurisdiction-by-jurisdiction basis, entangling prosecutors at every level in proceedings during which the underlying facts of each criminal prosecution at issue will be revisited with the full participation of not simply chief and supervising attorneys, but courtroom prosecutors as well.

Moreover, the *Brady* obligation encompasses not simply a requirement to disclose exculpatory information concerning a witness under *Giglio*. Virtually every criminal conviction that is reversed based upon a *Brady* violation of any kind therefore becomes a font from which a plaintiff will no doubt assert that the individual prosecutor's *Brady* violation may be traced back to a chief advocate's or supervising prosecutor's decisions with respect to enacting policies and training, including an "information management" system concerning the information in question. This Court observed in *Imbler* that the ubiquitous presence

of potential *Brady* claims against prosecutors necessitated absolute immunity because the exposure to such liability would improperly impact prosecutorial decisionmaking and burden the judicial process. *Imbler*, 424 U.S. at 424-425. These same perils threaten, and indeed are multiplied, with respect to chief prosecutors and supervising prosecutors.

The assertion by respondent that to the extent any constitutional claim can be traced to "information management" it must fall outside of prosecutorial immunity, is not simply an invitation, but a guarantee of boot-strapped constitutional claims for all aspects of purported prosecutorial misconduct. As previously noted, most prosecutorial activities can, through use of respondent's parsing, be reduced to nothing more than "information management." Keeping track of witnesses? Information management. Keeping track of evidence? Information management. Keeping track of testimony? Information management. All of these activities could be theoretically traced to the failure of a chief advocate or supervising attorney to make sure that there was some sort of policy, training, or system to keep track of and allow access to such information for use by prosecutors in the courtroom. Virtually every reversed conviction is traceable to "information management."

Moreover, the spectre of such potential liability will negatively impact chief prosecutors and supervising prosecutors in making basic decisions concerning the manner in which cases are prosecuted. Again minutely parsing his claim, respondent speciously

asserts that the only consequence of subjecting chief prosecutors and supervising prosecutors to potential liability for decisions concerning policies directing the creation and implementation of an "information management" system concerning informants would be to include more, rather than less information. Resp. Brief 51. But the reality is, as petitioners have noted, a chief or supervising prosecutor faced with potential liability arising from use of informant testimony could just as simply make a blanket decision prohibiting use of informant testimony in any prosecution, regardless of how trustworthy or necessary it might be. It is precisely this sort of chilling effect on direct prosecutorial decisions – indeed, how much more prosecutorial can it be than to dictate which witnesses will be called in court – that lower appellate courts have recognized compel application of absolute immunity for chief prosecutors. Pet. Brief at 35, citing *Hanesworth v. Miller*, 820 F.2d 1245, 1270 n.199 (D.C. Cir. 1987), abrogated on unrelated point by *Hartman v. Moore*, 547 U.S. 250, 256, 265-266 (2006).

2. The volume and fact-intensive nature of potential *Brady* claims against chief advocates and supervising attorneys for decisions concerning policy and training render qualified immunity insufficient to protect the judicial process.

Nor does qualified immunity provide sufficient protection to secure the vital independence necessary

to make prosecutorial decisions. As this Court observed in *Imbler*, criminal proceedings are necessarily fraught with multiple complex issues and tactical decisions, all of which will come into play if the criminal action is essentially retried in the context of attempting to establish qualified immunity. 424 U.S. at 425. This problem is not diminished simply because the plaintiff attempts to plead around the absolute immunity of an individual prosecutor by suing a chief or supervising prosecutor and attributing the purported misconduct to deficient policies or training – including decisions with respect to an "information management" system.

Qualified immunity is not established in a vacuum. To the contrary, as this Court has made plain, the inquiry is generally very fact specific, focusing on whether, given the facts the defendant possessed, he or she could have reasonable good faith belief premised on the governing law that the conduct was within constitutional boundaries. *Anderson v. Creighton*, 483 U.S. 635, 640-641 (1987). The claim asserted against petitioners here illustrates the fact intensive inquiry potentially necessary to establish qualified immunity. As respondent concedes, his complaint premises liability against petitioners based upon their purported knowledge of the widespread abuse of improper jailhouse informer testimony and need to improve information sharing concerning such witnesses. Resp. Brief 5, citing JA 44, 46. Thus, the question of what knowledge petitioners had before them will be front and center, which will require

chapter and verse exploration of the individual cases which purportedly should have put petitioners on notice. The same would be true in virtually any policy and training-based case against chief advocates and supervising prosecutors.

Establishing qualified immunity as well as any defense in the underlining merits of such a claim would also necessarily entangle front-line prosecutors in litigation and require them to testify as percipient witnesses as to their particular conduct in the underlying criminal case. Respondent sidesteps this issue, simply arguing in conclusory fashion that once a conviction is reversed in satisfaction of *Heck*, that somehow the facts of the underlying trial will become irrelevant. Resp. Brief 50. As noted above, not so. Line prosecutors will be required to testify as percipient witnesses for purposes of establishing a factual basis for qualified immunity, as well as with respect to causation and other related issues.

Indeed, even in the context of a case where an "information management" system of the sort urged by respondent existed, there would be an issue as to whether the individual prosecutor did or did not consult it, and further issues as to whether particular prosecutors in other prosecutions adequately or properly noted that a particular witness received consideration for his or her testimony. Moreover, the individual prosecuting attorney will be questioned as to various other tactics that may or may not have influenced the outcome. The reality is, however, that the prosecutor will have to testify, and it is the very

threat of this entanglement that this Court has recognized chills prosecutorial decisionmaking. A prosecutor faced with the prospect of acting as a witness in rehashing his entire trial history based upon a decision to use a jailhouse informant, or a coconspirator subject to a plea deal as a witness, may think twice about doing so.

Similarly, as noted, chief advocates and supervising attorneys themselves, subject to an onslaught of potential claims arising from the use of such witnesses, could simply issue a blanket policy prohibiting their use. This is exactly the adverse impact on prosecutorial judgment and independence that unacceptably impedes and burdens the judicial process. *Imbler*, 424 U.S. at 427-428.

3. Mechanisms, other than suits for damages against chief advocates and supervising attorneys provide a sufficient check on decisionmaking concerning prosecutorial policy and training.

Against these compelling public policies, respondent makes no showing of the need to impose potential liability in a single case, even one where correction at the hands of the criminal justice system comes lamentably late. In *Imbler*, this Court expressly recognized that there was a tradeoff that

would create hardship in individual cases.[2] 424 U.S. at 427-428.

Moreover, the ameliorative factors of the self-correcting nature of the criminal justice system, ethical standards for attorneys and the availability of professional discipline,[3] potential criminal liability and uniquely with respect to many chief prosecutors, public opinion and electoral or political accountability are directly applicable to the actions of a chief or supervising prosecutor.

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[2] In some cases, the hardship may be lessened through Legislative action. California, for example, authorizes the payment of up to $100 per day of wrongful incarceration, or a maximum of $36,500 per year of incarceration for those who have been wrongfully convicted, subject to legislative approval. Cal. Penal Code §§ 4900, 4904. The comparable federal statutory provisions for compensating innocent persons provides compensation of $50,000 for each year of prison confinement, and $100,000 for each year on death row. 28 U.S.C. § 2513.

[3] With respect to professional discipline, if anything, the focus is now turned to increasing scrutiny of prosecutors for such alleged misconduct. Petitioner John Van de Kamp is the Chair of the California Commission on the Fair Administration of Justice. That body issued a report and recommendation on reporting misconduct that notes shortcomings of the current disciplinary system in making certain that disciplinary proceedings are instituted against not simply district attorneys but also public defenders for misconduct resulting in improper criminal convictions. *See* Brief of Amicus Curiae, Innocence Network at 26; California Commission on the Fair Administration of Justice, *Report and Recommendation on Reporting Misconduct* (October 18, 2007), available at http://www.ccfaj.org/documents/reports/prosecutorial/official/OFFICIAL%20REPORT%20ON%20REPORTING%20MISCONDUCT.pdf. It also suggests reforms to improve the disciplinary system in this respect. *Id.* at 21-27.

It cannot escape notice that the genesis of respondent's lawsuit was a successful attack on his conviction through the criminal justice system or that the centerpiece of his complaint is a grand jury report by a public watchdog agency, delving at length into the very problem of which he complains. If anything, this case underscores that this Court was correct in its understanding of the potential corrective factors for misconduct other than entangling prosecutors in litigation for prosecutorial decisions.

CONCLUSION

For the foregoing reasons, petitioners respectfully request that the judgment of the United States Court of Appeals for the Ninth Circuit be reversed with directions to reverse the order denying Mr. Van de Kamp and Mr. Livesay's motion to dismiss and to enter an order dismissing the action.

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AMICUS CURIAE BRIEF

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No. 07-854

In the Supreme Court of the United States

JOHN VAN DE KAMP, ET AL., PETITIONERS

v.

THOMAS LEE GOLDSTEIN

ON A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether supervisory prosecutors are entitled to absolute prosecutorial immunity from suits for damages alleging that they violated *Giglio* v. *United States*, 405 U.S. 150 (1972), by failing to develop policies to ensure information sharing among prosecutors concerning jailhouse informants and failing to provide adequate supervision and training concerning *Giglio* obligations.

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF PETITIONER

INTEREST OF THE UNITED STATES

The United States employs more than 4500 Assistant United States Attorneys, who in Fiscal Year 2007 filed criminal charges in more than 59,000 cases against more than 80,000 defendants. Executive Office for U.S. Attorneys, U.S. Department of Justice, *United States Attorneys Annual Statistical Report: Fiscal Year 2007*, at 3 (Overview Chart 1), 9. Those prosecutors are supervised by 93 United States Attorneys (*id.* at 1), 175 First Assistants or Criminal Chiefs, and numerous Supervisory Assistant United States Attorneys. In addition, federal prosecutors in the litigating Divisions of the Department of Justice are supervised by Chiefs and Deputy Chiefs in their Divisions.

Although federal officers are not subject to suit under 42 U.S.C. 1983, they may be sued for damages for violations of constitutional rights under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). The immunity granted to federal officers in *Bivens* generally parallels the immunity that state officers enjoy in suits under Section 1983. See, *e.g.*, *Antoine* v. *Byers & Anderson, Inc.*, 508 U.S. 429, 433 n.5 (1993); *Harlow* v. *Fitzgerald*, 457 U.S. 800, 818 n.30 (1982); *Butz* v. *Economou*, 438 U.S. 478, 504 (1978). Thus, the disposition of the immunity issue in this case could significantly affect federal prosecutors and the broader interest of the United States in ensuring "the vigorous and fearless performance of the prosecutor's duty that is essential to the proper functioning of the criminal justice system." *Imbler* v. *Pachtman*, 424 U.S. 409, 427-428 (1976).

STATEMENT

1. In 1980, respondent was prosecuted for murder by Los Angeles County deputy district attorneys who were then under the general supervisory control of petitioners, the former Los Angeles County District Attorney and his chief deputy. During petitioner's trial, the prosecution relied on the testimony of a jailhouse informant, Edward Floyd Fink, who testified that respondent had confessed to the murder while both were being detained at the Long Beach City Jail and that Fink had received no favors or benefits from the State for his testimony. Respondent served 24 years of his prison term, but in April 2004 he was released after securing habeas relief. Pet. App. 3-5.

After his release, respondent brought suit under Section 1983 against petitioners as well as the City of Long

Beach, the County of Los Angeles, and four officers of the Long Beach Police Department. The complaint alleges that Fink falsely testified that respondent confessed to the murder and that Fink had not received any benefits for testifying against respondent. The complaint further alleges that, in fact, Fink had acted as an informant for several years and had received multiple reduced sentences in return. Pet. App. 3-4. The complaint alleges that other deputy district attorneys under the supervisory control of petitioners were aware of those benefits, but that such information was never shared with the deputy district attorneys who prosecuted respondent during the 1980 murder trial. *Id.* at 4.

The complaint alleges that this Court's decision in *Giglio* v. *United States*, 405 U.S. 150 (1972), imposed "an administrative duty" on petitioners "to create a system in which information pertaining to jailhouse informants would be disseminated" to deputy district attorneys. J.A. 50 (¶ 104). The complaint further alleges that petitioners

> purposefully or with deliberate indifference failed to create any system for the Deputy District Attorneys handling criminal cases to access information pertaining to the benefits provided to jailhouse informants and other impeachment information, and failed to train Deputy District Attorneys to disseminate information pertaining to benefits provided to jailhouse informants and other impeachment information.

J.A. 45 (¶ 92); see J.A. (¶¶ 105, 106), 68-70 (¶¶ 152, 154). The suit alleges that based on petitioners' failure to create such a system, and their failure to train and to supervise their subordinates in such a system, the prosecu-

tors who handled respondent's case did not have access to impeachment information concerning Fink, such that the information was not shared with defense counsel, in violation of *Giglio*. Pet. App. 4-5.

2. Petitioners moved to dismiss the claims against them on the ground that the claims were barred by absolute immunity. The district court denied the motion, holding that petitioners were not entitled to absolute immunity because the nature of the challenged alleged conduct was "administrative." Pet. App. 18-20.

3. On interlocutory appeal, the court of appeals affirmed. Pet. App. 1-15. The court of appeals stated that it would "assume without deciding that [respondent] has alleged a deprivation of a constitutional right under § 1983" and that "[w]hether the alleged conduct is sufficient to state a claim for liability under § 1983 is therefore not before the [c]ourt." *Id.* at 6 (quoting *Genzler* v. *Longanbach*, 410 F.3d 630, 644 (9th Cir.), cert. denied, 546 U.S. 1031 (2005)).

Turning to the issue of immunity, the court explained that absolute immunity applies to "conduct that is 'intimately associated with the judicial phase of the criminal process'" and "occur[s] in the course of his [or her] role as an advocate for the State." Pet. App. 7 (quoting *Imbler* v. *Pachtman*, 424 U.S. 409, 430 (1976), and *Buckley* v. *Fitzsimmons*, 509 U.S. 259, 273 (1993)). The court observed, however, that a prosecutor is entitled to only qualified immunity "if he or she is performing investigatory or administrative functions, or is essentially functioning as a police officer or detective." *Ibid.* (quoting *Broam* v. *Bogan*, 320 F.3d 1023, 1028 (9th Cir. 2003)). The court accordingly stated that "when determining whether absolute immunity applies, courts must examine 'the nature of the function performed, not the iden-

tity of the actor who performed it." *Id.* at 8 (quoting *Forrester* v. *White*, 484 U.S. 219, 229 (1988)).

Applying that functional inquiry, the court of appeals held that the alleged conduct was "administrative and not prosecutorial in function." Pet. App. 13. The court acknowledged that "the specific duty to share information regarding jailhouse informants arose only because of [petitioners'] roles as prosecutors." *Id.* at 14. But the court reasoned that petitioners' alleged "failure to promulgate policies regarding the sharing of information relating to informants and their failure to adequately train and supervise deputy district attorneys on that subject, bear a close connection only to how the District Attorney's Office was managed, not to whether or how to prosecute a particular case or even a particular category of cases." *Id.* at 15.

SUMMARY OF ARGUMENT

The court of appeals erred in holding that supervisory prosecutors lack absolute immunity from suits seeking damages alleging that they violated *Giglio* v. *United States*, 405 U.S. 150 (1972), by failing to develop policies to ensure information sharing among prosecutors concerning jailhouse informants and failing to provide adequate supervision and training concerning *Giglio* obligations.

A. In *Imbler* v. *Pachtman*, 424 U.S. 409, 431 (1976), this Court held that "in initiating a prosecution and in presenting the State's case, the prosecutor is immune from a civil suit for damages under [Section] 1983." In that case, the prosecutor had been sued for knowingly presenting false testimony at trial and deliberately suppressing exculpatory evidence. The Court explained that those activities were "intimately associated with the

judicial phase of the criminal process" and thus claims arising out of those activities were barred by absolute immunity. *Id.* at 416, 430. The Court reached that result because of a "concern that harassment by unfounded litigation would cause a deflection of the prosecutor's energies from his public duties, and the possibility that he would shade his decisions instead of exercising the independence of judgment required by his public trust." *Id.* at 423.

Subsequent cases have confirmed that a functional approach governs what actions by prosecutors are entitled to absolute immunity. *Burns* v. *Reed*, 500 U.S. 478, 486 (1991). A prosecutor is therefore absolutely immune for carrying out prosecutorial duties as an advocate for the government in judicial criminal proceedings. *Kalina* v. *Fletcher*, 522 U.S. 118, 128-129 (1997); *Buckley* v. *Fitzsimmons*, 509 U.S. 259, 272 (1976); *Burns*, 500 U.S. at 491. Conversely, a prosecutor is entitled to only qualified immunity when carrying out "administrative duties and those investigatory functions that do not relate to an advocate's preparation for the initiation of a prosecution or for judicial proceedings." *Buckley*, 509 U.S. at 273.

B. The duty to disclose material impeachment evidence under *Giglio*, like the duty to disclose materially exculpatory evidence under *Brady* v. *Maryland*, 373 U.S. 83 (1963), implicates the core prosecutorial function to seek justice and the truth in the prosecution of criminal cases. See, *e.g.*, *Kyles* v. *Whitley*, 514 U.S. 419, 439 (1995). But nothing in *Giglio* or any other decision of this Court creates a free-standing constitutional obligation for supervisory prosecutors to establish particular policies or procedures or to train and supervise line prosecutors, in order to ensure compliance with *Giglio*.

Rather, the Constitution imposes a duty of disclosure of material evidence in a particular criminal case. *Kyles*, 514 U.S. at 438; *Giglio*, 405 U.S. at 154. The allegations that petitioners failed to establish certain procedures or to train or supervise line prosecutors in those procedures do not state a violation of that duty.

In any event, even assuming (as did the courts below) that supervisory prosecutors do have a duty under *Giglio* to establish a particular set of procedures and to train and supervise their subordinates in those procedures, claims alleging violations of that duty would be barred by absolute immunity. *Imbler*, *supra*. Respondent cannot circumvent the doctrine of absolute prosecutorial immunity by characterizing policy formation, training, and supervision as *administrative* in nature or, as did the Ninth Circuit, as involving a *managerial* function. Pet. App. 15. Whether a supervisor directs a line prosecutor how to comply with *Giglio* in a particular case, or whether the supervisor reduces her guidance on *Giglio* compliance to a written policy that governs all prosecutions, the supervisor is carrying out the core prosecutorial function of *Giglio* compliance. There is no basis for Ninth Circuit's anomalous rule that would afford prosecutorial immunity to a supervisor who *intentionally* directs a line prosecutor to violate *Giglio* but that would deny the same immunity to a supervisor whose policies, training, and supervision on *Giglio* compliance (or lack thereof) cause an *inadvertent* violation by a line prosecutor.

C. All of the policy justifications for extending absolute immunity to a line prosecutor who violates *Giglio* apply with equal or greater force to a supervisory prosecutor who allegedly failed to establish policies and to provide adequate training and supervision about *Gig-*

lio compliance. Denying absolute immunity for policy formation, training, and supervision by supervisory prosecutors would permit hundreds if not thousands of suits for damages against supervisors who are responsible for setting policies and providing prosecutorial guidance to their subordinates.

Such suits would severely disrupt the functioning of the office of the prosecutor in a multitude of ways. Prosecutors would be faced with defending their decisions to set policies, or not to set policies, on *Giglio* compliance. They also could have to re-litigate issues involved in the underlying criminal trial of the defendant, such as whether there was a non-disclosure, the materiality of the evidence, and the cause of the *Giglio* violation. That litigation would intrude on sensitive prosecutorial deliberations as well as open the door to burdensome discovery. The criminal justice system as well would be adversely affected by such suits, because courts faced with collateral challenges to criminal convictions could be influenced by concerns about exposing supervisory prosecutors to suits for damages.

At the same time, extending absolute immunity to supervisory prosecutors does not leave the public powerless to deter and punish prosecutorial misconduct. *Imbler*, 424 U.S. at 429. Supervisory prosecutors are subject to a variety of sanctions that ensure that prosecutors fulfill their ethical duties and special role in the criminal justice system. *Giglio* itself imposes a strong incentive to establish robust policies favoring disclosure of material evidence because, *inter alia*, the failure to abide by *Giglio* can result in the forfeiture of a criminal conviction. Supervisory prosecutors are also subject to professional discipline, public disapproval, and even criminal penalties for wilful misconduct.

ARGUMENT

SUPERVISORY PROSECUTORS ARE ABSOLUTELY IMMUNE FROM DAMAGES BASED ON THEIR CONDUCT IN ESTABLISHING (OR IN FAILING TO ESTABLISH) POLICIES ON COMPLIANCE WITH *GIGLIO* AND IN TRAINING AND SUPERVISING SUBORDINATES ON A PROSECUTOR'S *GIGLIO* OBLIGATIONS

This case was decided by the courts below on the assumption that a supervisory prosecutor may violate the constitutional right recognized in *Giglio*, *supra*, by failing to adopt procedures designed to avoid *Giglio* violations, or by failing to train or supervise line prosecutors in those procedures. Pet. App. 4, 6. That assumption is unfounded. *Giglio* recognizes a constitutional protection consisting of a duty to disclose material impeachment evidence *in a particular case*. It does not impose a free-standing procedural obligation on supervisory prosecutors to adopt procedures or to train or supervise line prosecutors to reduce the risk of *Giglio* violations across the board. It may be advisable for supervisory prosecutors to devise such policies or provide such training to reduce the risk that individual prosecutions will not be compromised. But *Giglio* does not impose that kind of wholesale obligation on supervisory prosecutors. In any event, even assuming the existence of a *Giglio* violation in these circumstances, the court of appeals erred in holding that petitioners do not enjoy absolute immunity from such *Giglio* claims.

Absolute immunity protects prosecutors from the burdens and distractions of having to defend claims for personal damages liability for actions undertaken in the prosecutorial role. Contrary to the Ninth Circuit's view, the claim that petitioners failed to establish policies and procedures for sharing *Giglio* information and their al-

leged failure to provide proper training and supervision of prosecuting attorneys on the sharing of that information implicates all of the policies that justify absolute immunity. A prosecutor's duty to disclose impeachment information in compliance with *Giglio* is "intimately associated with the judicial phase of the criminal process" (*Imbler*, 424 U.S. at 430) and involves the prosecutor's unique role in the criminal justice system. A line prosecutor who fails to make such a disclosure is entitled to absolute prosecutorial immunity. Assuming *Giglio* applies in the circumstances here, a supervisory prosecutor sued for damages in failing to establish policies, institute training, or supervise those who failed to make the disclosure is entitled to no less.

A. Prosecutors Are Entitled To Absolute Immunity For Carrying Out Their Prosecutorial Functions

1. In *Imbler*, this Court held that "in initiating a prosecution and in presenting the State's case, the prosecutor is immune from a civil suit for damages under [Section] 1983." 424 U.S. at 431. Thus, the Court decided, the state prosecutor in that case was absolutely immune from charges that he knowingly presented false testimony at trial and deliberately withheld exculpatory evidence from the defense. *Id.* at 416, 431 & n.34. In so holding, the Court concluded that such activities were "intimately associated with the judicial phase of the criminal process, and thus were functions to which the reasons for absolute immunity apply with full force." *Id.* at 430.

Those reasons "include concern that harassment by unfounded litigation would cause a deflection of the prosecutor's energies from his public duties, and the possibility that he would shade his decisions instead of exer-

cising the independence of judgment required by his public trust." *Imbler*, 424 U.S. at 423. Such suits, the Court added, "could be expected with some frequency," and would require an enormous diversion of energy to defend. *Id.* at 425. The Court concluded that extending only qualified immunity to a prosecutor "would prevent the vigorous and fearless performance of the prosecutor's duty that is essential to the proper functioning of the criminal justice system." *Id.* at 427-428.

The Court also observed that although absolute immunity "does leave the genuinely wronged defendant without civil redress against a prosecutor whose malicious or dishonest action deprives him of liberty," such immunity "does not leave the public powerless to deter misconduct or to punish that which occurs." *Imbler*, 424 U.S. at 427, 429. A prosecutor is subject to the criminal law for his willful acts, the Court explained, and he "stands perhaps unique, among officials whose acts could deprive persons of constitutional rights, in his amenability to professional discipline by an association of his peers." *Id.* at 429.

Imbler recognized that the scope of absolute prosecutorial immunity extended beyond in-court conduct because "the duties of the prosecutor in his role as advocate for the State involve actions preliminary to the initiation of a prosecution and actions apart from the courtroom." 424 U.S. at 431 n.33. The Court did not, however, decide whether absolute immunity extended to "those aspects of the prosecutor's responsibility that cast him in the role of an administrator or investigative officer rather than that of an advocate," *id.* at 430-431, or precisely how to distinguish those roles, *id.* at 431 n.33.

2. Subsequent cases have confirmed that the Court takes a "functional approach" in determining which actions by a prosecutor are subject to absolute immunity. *Burns*, 500 U.S. at 486. That approach "looks to 'the nature of the function performed, not the identity of the actor who performed it.'" *Buckley*, 509 U.S. at 269 (quoting *Forrester* v. *White*, 484 U.S. 219, 229 (1988)). Absolute immunity extends to claims challenging not only the decision to initiate a prosecution and the filing of charging documents with the court, *Kalina*, 522 U.S. at 128-129, but also any "'duties of the prosecutor in his role as advocate for the State,'" *Buckley*, 509 U.S. at 272 (quoting *Imbler*, 424 U.S. at 431 n.33).

Those duties often will "involve actions preliminary to the initiation of a prosecution and actions apart from the courtroom" and "include the professional evaluation of the evidence assembled by the police and appropriate preparation for its presentation at trial or before a grand jury after a decision to seek an indictment has been made." *Buckley*, 509 U.S. at 272, 273 (citation omitted). For instance, absolute immunity extends to claims challenging a prosecutor's appearance as a lawyer in a probable cause hearing in examining a witness and seeking a search warrant. *Burns*, 500 U.S. at 487-492. Immunity applies in those situations because the duties "involve the prosecutor's 'role as advocate for the State'" and "are connected with the prosecutor's role in judicial proceedings." *Id.* at 491 (quoting *Imbler*, 424 U.S. at 431 n.33), 494; accord *Buckley*, 509 U.S. at 271.

Absolute immunity is not available to "administrative duties and those investigatory functions that do not relate to an advocate's preparation for the initiation of a prosecution or for judicial proceedings." *Buckley*, 509 U.S. at 273. Prosecutorial immunity thus does not ex-

tend to acts by a prosecutor in giving legal advice to police officers about the use of hypnosis and the existence of probable cause to arrest a suspect, *Burns*, 500 U.S. at 492-496, or to investigative work performed before probable cause to arrest a suspect has been established, *Buckley*, 509 U.S. at 274-275. In those instances, the prosecutor "performs the investigative functions normally performed by a detective or police officer." *Id.* at 273; see *Kalina*, 522 U.S. at 126.

Absolute immunity also does not extend to a prosecutor's statements to the press because "[c]omments to the media have no functional tie to the judicial process just because they are made by a prosecutor." *Buckley*, 509 U.S. at 277. Similarly, qualified, rather than absolute, immunity applies to personnel actions brought by employees. *Ceballos* v. *Garcetti*, 361 F.3d 1168, 1170, 1184 (9th Cir. 2004) (prosecuting attorney brought First Amendment retaliation claim against his supervisors), rev'd on other grounds, 547 U.S. 410 (2006); cf. *Forrester*, 484 U.S. at 229 (Judge "was acting in an administrative capacity when he demoted and discharged" a court employee and thus was not entitled to absolute immunity.). Likewise, absolute immunity does not apply to a prosecutor's sworn statements attesting to the factual grounds for an arrest warrant because "the only function she performs in giving sworn testimony is that of a witness," not of a lawyer. *Kalina*, 522 U.S. at 131.

B. Absolute Immunity Bars All Claims Challenging A Supervisory Prosecutor's Role In Complying With *Giglio*

1. The Due Process Clause imposes on the prosecution in a criminal trial an "affirmative duty to disclose evidence favorable to a defendant." *Kyles*, 514 U.S. at 432. That duty is "most prominently associated with this

Court's decision in *Brady*." *Ibid.* *Brady* held "that the suppression by the prosecution of evidence favorable to an accused * * * violates due process where the evidence is material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution." 373 U.S. at 87.

In *Giglio*, the Court held that the due process rule of *Brady* was violated when the government failed to disclose impeachment evidence consisting of a prosecutor's promise to a key government witness that he would not be prosecuted in exchange for grand jury and trial testimony. 405 U.S. at 152-154. The Court explained that "whether the nondisclosure was a result of negligence or design, it is the responsibility of the prosecutor" to communicate to the defense promises made to a witness by the prosecutor's office. *Id.* at 154. Thus, "[i]mpeachment evidence, * * * as well as exculpatory evidence, falls within the *Brady* rule." *United States* v. *Bagley*, 473 U.S. 667, 676 (1985); see *Strickler* v. *Greene*, 527 U.S. 263, 280 (1999); *Kyles*, 514 U.S. at 433-434.

The prosecution's duty to disclose material exculpatory evidence "illustrate[s] the special role played by the American prosecutor in the search for truth in criminal trials." *Strickler*, 527 U.S. at 281. A prosecutor is "the representative * * * of a sovereignty * * * whose interest * * * in a criminal prosecution is not that it shall win a case, but that justice shall be done." *Berger* v. *United States*, 295 U.S. 78, 88 (1935); see *Strickler*, 527 U.S. at 281; *Kyles*, 514 U.S. at 439; *United States* v. *Agurs*, 427 U.S. 97, 111 (1976); see also *Bagley*, 473 U.S. at 675 n.6 ("By requiring the prosecutor to assist the defense in making its case, the *Brady* rule represents a limited departure from a pure adversary model."). The prosecutor's responsibility under *Brady* and *Giglio* is

vital "to preserve the criminal trial * * * as the chosen forum for ascertaining the truth about criminal accusations." *Kyles*, 514 U.S. at 440; *Bagley*, 473 U.S. at 675 (disclosure ensures that a "miscarriage of justice does not occur"); *Agurs*, 427 U.S. at 104 (non-disclosure involves a "corruption of the truth-seeking function of the trial process").

2. Under the foregoing principles, claims challenging a prosecutor's failure to comply with *Brady* or *Giglio* implicate a core prosecutorial function, and such claims are therefore barred by absolute immunity. As discussed, the Court in *Imbler* held that a prosecutor was entitled to absolute immunity from claims that he deliberately suppressed exculpatory evidence. The Court explained that "[d]enying absolute immunity from suppression claims could * * * eviscerate, in many situations, the absolute immunity from claims of using perjured testimony." 424 U.S. at 432 n.34; see *Kalina*, 522 U.S. at 124 (observing that *Imbler* extended absolute immunity to suppression claims even though those claims were "broader than any specific common-law antecedent").[1]

Absolute immunity applies with equal force to a claim that a *supervisory* prosecutor directed a *Brady* or *Gig-*

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[1] The courts of appeals have accordingly held that a prosecuting attorney is entitled to absolute immunity for alleged *Brady* violations. See *Broam* v. *Bogan*, 320 F.3d 1023, 1030 (9th Cir. 2003); *Long* v. *Satz*, 181 F.3d 1275, 1279 (11th Cir. 1999) (per curiam); *Moore* v. *Valder*, 65 F.3d 189, 194 (D.C. Cir. 1995), cert. denied, 519 U.S. 820 (1996); *Reid* v. *New Hampshire*, 56 F.3d 332, 336 (1st Cir. 1995); *Carter* v. *Burch*, 34 F.3d 257, 262-263 (4th Cir. 1994), cert. denied, 513 U.S. 1150 (1995); *Buckley* v. *Fitzsimmons*, 20 F.3d 789, 794 (7th Cir. 1994), cert. denied, 513 U.S. 1085 (1995); *Prince* v. *Wallace*, 568 F.2d 1176, 1178 (5th Cir. 1978) (per curiam); *Hilliard* v. *Williams*, 540 F.2d 220, 221 (6th Cir. 1976) (per curiam).

lio violation in a particular case, such as a claim that a supervisor directed his subordinates not to share impeachment information with other prosecutors. A supervisory prosecutor's participation in the non-disclosure of *Brady* or *Giglio* information implicates a core duty of the prosecution. See, *e.g.*, Executive Office for U.S. Attorneys, U.S. Dep't of Justice, *United States Attorneys' Manual* § 9.5100(3) (Dec. 2006) (*U.S. Attorneys' Manual*) (requiring each prosecuting office to designate a senior official to communicate with investigative agencies about *Giglio* material). As the Ninth Circuit has correctly observed, "if [the plaintiff's] allegation is to be understood to mean that [the supervisor] was directly involved in the decision not to [disclose evidence], he too would enjoy the same absolute prosecutorial immunity which shields [the prosecuting attorney]." *Ybarra* v. *Reno Thunderbird Mobile Home Vill.*, 723 F.2d 675, 680 (9th Cir. 1984); *Hamilton* v. *Daley*, 777 F.2d 1207, 1213 n.5 (7th Cir. 1985) ("Since absolute immunity protects prosecutorial decisions, supervision of the prosecutors who make these decisions is similarly immune."). In short, a supervisor is no less functioning as a prosecutor by virtue of being a supervisor.

3. Those principles dictate that absolute immunity applies to the claims against petitioners in this case. Those claims involve petitioners' responsibility as prosecutors, *i.e.*, their duties in their "role as advocate for the State." *Imbler*, 424 U.S. at 431 n.33. The claims here are brought by a defendant in a criminal case, arising out of the non-disclosure of *Giglio* information that allegedly led to his criminal conviction. Respondent also does not allege that petitioners were functioning as investigators. He alleges that county prosecutors, including petitioners, allegedly violated duties mandated by

this Court's decision in *Giglio*. Because those allegations are "intimately associated with the judicial phase of the criminal process," *id.* at 430, 431 n.33, respondent's challenge is barred by prosecutorial immunity.

Respondent seeks to avoid the doctrine of absolute immunity by alleging that *Giglio* created "an *administrative duty* to create a system in which information pertaining to jailhouse informants * * * would be disseminated" among prosecuting attorneys in the District Attorney's Office, J.A. 50 (¶ 104) (emphasis added), and that petitioners purposefully, or with deliberate indifference, violated that duty and failed to train and supervise prosecuting attorneys in such a system, J.A. 45-46 (¶ 92), 50-51 (¶¶ 104-106), 68-70 (¶¶ 152, 154); see Br. in Opp. 6 (stating that "[t]he theory of [respondent's] suit [i]s that [petitioners] have administrative obligations to create an information management system about informants and an obligation to train staff about maintaining this information management system" and that "[t]hese obligations arise from [*Giglio*]"). The court of appeals, in characterizing respondent's allegations, similarly stated that "prosecutors' offices have a constitutional obligation to establish 'procedures and regulations . . . to insure communication of all relevant information on each case * * * to every lawyer who deals with it.'" Pet. App. 4 (quoting *Giglio*, 405 U.S. at 154). That effort to circumvent the bar against suing prosecutorial officials for prosecutorial actions fails.

As an initial matter, the above theory does not allege a valid constitutional claim and that provides an independent basis for reversing the decision below. Neither *Giglio* nor any other decision of this Court creates a free-floating constitutional duty for supervisory prosecutors to establish procedures, regulations, or a system

for the dissemination of impeachment evidence among prosecutors within the office, much less a specific "information management system about informants." Br. in Opp. 6. Nor is the due process principle recognized in *Brady* and applied in *Giglio* violated simply by a failure to train or supervise line prosecutors. To be sure, it may be advisable for supervisory prosecutors to develop such policies or provide such training or supervision to reduce the risk that *Giglio* violations will be committed in particular prosecutions, but the Constitution does not mandate the adoption of such policies or practices.[2]

The Constitution imposes an affirmative prosecutorial duty of disclosure of material evidence in a particular criminal case. That duty exists to protect the defendant's right to a fair trial. Accordingly, this Court has held that a defendant's conviction must be reversed upon non-disclosure of material evidence, even where impeachment evidence is not known to the individual prosecutor on the case but is "known to the others acting on the government's behalf in the case, including the

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[2] The Ninth Circuit expressly did not determine whether respondent alleged a valid constitutional claim against petitioners but assumed the validity of the claim in resolving the immunity issue. Pet. App. 6. This Court took a similar approach in *Buckley*, 509 U.S. at 261, and *Kalina*, 522 U.S. at 122; cf. *Saucier* v. *Katz*, 533 U.S. 194 (2001) (establishing a different framework for considering qualified immunity claims). While the Court has not considered itself obligated to address the underlying constitutional claim in resolving absolute immunity claims, it could resolve the case by holding that the novel constitutional duty that the complaint invokes has no basis in the Due Process Clause or any other constitutional provision. At a minimum, however, if the Court decides this case based on the assumption made by the courts below, it should make clear that it is doing so solely for purposes of resolving the immunity issue decided below and that it is not embracing the novel constitutional duty on which respondent's *Giglio* claims rest.

police." *Kyles*, 514 U.S. at 437-438; *Giglio*, 405 U.S. at 154; *U.S. Attorneys' Manual* § 9-5.000(B)(2) (Dec. 2006) (federal prosecutors, "in preparing for trial," must seek all exculpatory and impeachment information from "federal, state, and local law enforcement officers and other government officials participating in the investigation and prosecution of the criminal case against the defendant").[3]

In that respect, the "*individual prosecutor* has a duty to learn of any favorable evidence known to the others acting on the government's behalf." *Kyles*, 514 U.S. at 437 (emphasis added); *Strickler*, 527 U.S. at 281. In *Giglio*, the Court explained that information in the possession of the prosecutor's office is charged to the prosecuting attorney and commented that "[t]o the extent that this places a burden on the large prosecution offices, procedures and regulations can be established to carry that burden and to insure communication of all relevant information on each case to every lawyer who deals with it." *Giglio*, 405 U.S. at 154; *Kyles*, 514 U.S. at 438. Far from imposing a constitutional obligation on supervisory prosecutors to establish precise policies and procedures or any information management system in particular, the Court's statement in *Giglio* observed only that compliance with its rule was feasible as a practical matter: "the prosecutor has the *means* to discharge the government's *Brady* responsibility" by establishing appropriate procedures. *Ibid.* (emphasis added).

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[3] The lower courts have similarly held that prosecutors do not have a duty to learn of information possessed by other jurisdictions or other government agencies with no involvement in the investigation or prosecution at issue. See, *e.g.*, *United States* v. *Morris*, 80 F.3d 1151, 1169 (7th Cir.), cert. denied, 519 U.S. 868 (1996); *United States* v. *Meros*, 866 F.2d 1304, 1309 (11th Cir.), cert. denied, 493 U.S. 932 (1989).

The Court did *not* hold that supervisory prosecutors violate the Constitution by failing to establish such procedures. Accordingly, *Giglio* does not support the claim made against petitioners in this case, and the theory of *Giglio* affords no basis for positing that the Due Process Clause requires particular internal management structures or procedures.

4. In any event, respondent's purported constitutional claim is barred by absolute immunity. While supervisors are under no constitutional duty to establish certain procedures for *Giglio* compliance, when they do so they are functioning as prosecutors and exercising discretion in the conduct of criminal cases.[4] Accordingly, even if *Giglio* could be read to impose a duty to establish information-sharing procedures, that duty would arise only by virtue of petitioners' status as essential participants in the prosecutorial process—*i.e.*, as supervisory prosecutors. As respondent acknowledges, his suit is based on a theory that this Court in *Giglio* "directed" and "mandated" supervisory prosecutors to establish an information management system. Br. in Opp. 1, 6. And the court of appeals likewise concluded that the claims against petitioners "arose only because of their roles as prosecutors." Pet. App. 14. If that were so, the absolute immunity doctrine of *Imbler* would govern and defeat respondent's *Giglio* claims.

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[4] Supervisory prosecutors establish a range of policies for line prosecutors that are not required by the Constitution, but which still constitute core prosecutorial acts. For example, the government has established a policy generally restricting successive prosecutions (the "Petite policy"), which is not constitutionally compelled (see *Petite* v. *United States*, 361 U.S. 529 (1960) (per curiam); *U.S. Attorneys' Manual* § 9-2.031 (Oct. 2007)), but which would constitute a core exercise of prosecutorial discretion that would be protected by absolute immunity.

The Ninth Circuit reasoned that the allegations against petitioners concerning the establishment of policies and a training and supervision program "bear a close connection *only* to how the District Attorney's Office was managed." Pet. App. 15 (emphasis added). That attempt to treat the supervisory prosecutors' actions here as managerial rather than prosecutorial is fundamentally mistaken. Just as the prosecutorial function includes any acts taken by a supervisory prosecutor to comply with *Giglio* in a given case, see pp. 16-17, *supra*, the prosecutorial function includes decisions on whether to establish procedures to comply with *Giglio*, the content of any such procedures, and any training and supervision concerning such procedures. There is "no meaningful distinction between a decision on prosecution in a single instance and decisions on prosecutions formulated as policies for general application." *Haynesworth* v. *Miller*, 820 F.2d 1245, 1269 (D.C. Cir. 1987); accord *Roe* v. *City & County of San Francisco*, 109 F.3d 578, 583 (9th Cir. 1997).

For purposes of absolute immunity, there is accordingly no meaningful distinction between a supervisor's guidance, supervision, and training in a specific case on how to comply with *Giglio* and the promulgation of *general* policy on how to comply with *Giglio* in *all cases*. Suppose, for example, that a new prosecutor seeks out an experienced prosecutor for advice about how to comply with *Giglio*, and the supervisor instructs him on the sources of information to contact. That advice would indisputably be characterized as "prosecutorial." The characterization does not change if the supervisor decides to reduce her advice to a written manual that all of the prosecutors in the office can use to coordinate the office's compliance with *Giglio*. In both instances, the

supervisor functions as a prosecutor in her unique role to ensure fairness in the judicial process. Similarly, in both instances, the supervisor must make "judgment calls" and exercise "discretion" (*Kyles*, 514 U.S. at 437, 439) in particular cases involving such issues as materiality and what constitutes exculpatory and impeachment evidence. See, *e.g.*, *U.S. Attorneys' Manual* § 9-5.001 (Dec. 2006) (purposes of *Giglio* policy are "to promote regularity in disclosure practices, through the reasoned and guided exercise of prosecutorial judgment and discretion by attorneys for the government" and "to seek a just result in every case").

The same reasoning applies to an alleged failure by a supervisor "to create an information management system about informants" and "to train staff about maintaining this information system." Br. in Opp. 6. Whether such a system is appropriate for a particular office, and what training would be necessary, requires the exercise of professional judgment on how to fulfill the prosecution's duty of disclosure. Those decisions require "a balancing of myriad factors," including whether "prosecutorial resources" (*Haynesworth*, 820 F.2d at 1269) are best spent by creating, compiling, and maintaining an "informant information system" (Br. in Opp. 18). Indeed, we are not aware of any United States Attorney's Office in the country that has established the database contemplated by respondent. *Id.* at 18-19. And contrary to respondent's suggestion (*ibid.*), in order to establish such a system, prosecutorial judgments would have to be made concerning, *inter alia*, whether and why a system should be limited to informants (as opposed to other types of witnesses), how a system could compile and track cases in which an informant has testified (and what jurisdictions would be included), whether such sen-

sitive law-enforcement information should be maintained by the prosecution or investigators, and what would constitute a "benefit[] or promise[]" made to an informant (*id.* at 19).

In any event, as discussed, a supervisor's actions in setting policies on those topics would occur only in the supervisor's role as a prosecutor. Again, there is no meaningful difference between a supervisory prosecutor who establishes an informant-information system for general application; a supervisory prosecutor who gives particular guidance and training on how to use such a system in a particular case; and indeed a line attorney who develops and utilizes such a system in retrieving informant information for disclosure to the defense. All of those actions would occur within the larger framework of the truth-seeking function of the judicial process and would be intimately bound up with the role of the prosecutor as an advocate for the government. As such, absolute immunity bars all claims challenging those actions.

5. The Ninth Circuit's dichotomy between "administrative" and "prosecutorial" functions (Pet. App. 13) is also flawed conceptually. Some conduct that is actually "administrative" is also integrally bound up with carrying out the prosecutorial function, and thus the conduct is protected by absolute immunity.[5] For example, a line

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[5] The Ninth Circuit purported to leave open the question whether "it may be possible for an act to be prosecutorial in function but administrative in form," because it mistakenly characterized policy formation, training, and supervision of *Giglio* issues to be "administrative." Pet. App. 13. In fact, it does not matter how policy formation and the other supervisory tasks are described *in the abstract*; the performance (or alleged nonfeasance) of the core prosecutorial task of complying with

prosecutor may violate *Giglio* through her negligence involving misdelivery of the information to the wrong party, accidental destruction of the information, or the misentry of a informant's name in a hypothetical informant database. The prosecutor would be absolutely immune from claims involving those situations because the claims arise out of her role as a prosecutor. Immunity would not be lost simply because the specific acts causing the *Brady* violation could be said to be "clerical," "ministerial," or "administrative" or not to have involved the exercise of professional judgment. Br. in Opp. 19.

Absolute immunity would apply to those instances because the acts are intimately bound up with a core prosecutorial function—the duty to disclose *Giglio* information. Absolute immunity does not apply to "[a] prosecutor's administrative duties * * * *that do not relate* to an advocate's preparation * * * for judicial proceedings." *Buckley*, 509 U.S. at 273 (emphasis added).[6] This Court has "not retreated, however, from the principle that acts undertaken by a prosecutor in preparing * * * for trial, and which occur in the course of his role as an advocate for the State, are entitled to the protections of absolute immunity." *Ibid.* Because the supervisory duty alleged to be violated here *does* "relate to an advocate's preparation * * * for judicial proceedings," absolute immunity bars all claims challenging acts alleged to be in violation of that duty, even if in some sense it partakes of an "administrative" nature. *Ibid.*

Giglio is itself prosecutorial whether carried out at retail by the line prosecutor or at wholesale by his supervisor.

[6] See p. 13, *supra*. This case is thus far removed, for example, from a personnel action brought by an employee against a supervisor.

Similarly, if a *Giglio* violation results from the negligence of a prosecutor's subordinate, such as a secretary, the prosecutor does not lose absolute immunity simply because the complaint charges the prosecutor with deliberate indifference to the proper supervision of the secretary or to the management of his office. The same is true here. Respondent did not sue the individual prosecutors who allegedly violated respondent's *Giglio* rights by their non-disclosure of prosecutorial promises made to Fink. Instead, respondent sued supervisors who had no direct role in the violation but who are nonetheless alleged to be personally liable because they caused the violation in their capacities as managers and supervisors over the District Attorney's Office as a whole. Acceptance of that theory would permit a plaintiff to circumvent a prosecuting attorney's absolute immunity by suing his supervisor for negligent supervision. "Allowing the avoidance of absolute immunity through that pleading mechanism would undermine in large part the protections that [the Court] found necessary in *Imbler*." *Buckley*, 509 U.S. at 283 (Kennedy, J., concurring in part and dissenting in part).

C. Absolute Immunity For Supervisory Prosecutors Is Necessary For The Proper Functioning Of The Office Of The Prosecutor And The Judicial Process

The reasons identified by this Court in *Imbler* for extending absolute immunity to claims that a prosecuting attorney deliberately withheld exculpatory information in violation of *Brady* apply with equal or greater force to claims that a supervisory prosecutor deliberately failed to establish procedures and to provide training that would have prevented a violation of a defendant's constitutional rights. Indeed, there is no justifi-

cation for a rule that affords absolute immunity to a prosecuting attorney who *intentionally* withholds impeachment information and to a supervisor who *intentionally* directs such a violation, but that would deny such immunity to a high-level supervisor who establishes a policy that caused an *inadvertent* violation of *Giglio* to occur. Supervisory prosecutors must be accorded wide latitude to tailor how their offices will comply with the duties imposed by *Brady* and *Giglio*, free of the threat that policy judgments will be second-guessed in suits seeking to impose personal liability. Thus, absolute immunity is necessary to ensure "the vigorous and fearless performance of the prosecutor's duty that is essential to the proper functioning of the criminal justice system." *Imbler*, 424 U.S. at 427-428.

1. Denying absolute immunity to supervisory prosecutors for policies they set and their supervision and training concerning *Brady* and *Giglio* compliance would "present a substantial likelihood of vexatious litigation that might have an untoward effect on the independence of the prosecutor" and "[t]herefore[] absolute immunity of that function serves the policy of protecting the judicial process." *Burns*, 500 U.S. at 492; accord *Mitchell* v. *Forsyth*, 472 U.S. 511, 521-522 (1985); *Imbler*, 424 U.S. at 426. As the District of Columbia Circuit has explained, if this Court were

> to decline to insulate prosecutorial policymaking, an abundance of vexatious litigation would result. * * * Indeed, the threat to the policymaker may be amplified; he or she, as policymaker, faces the risk of recrimination from the potentially larger number of parties prosecuted in accordance with the agency directive. The threat of litigation is very real, and

indubitably would inhibit the performance of prosecutorial duties.

Haynesworth, 820 F.2d at 1269-1270.[7]

The threat of a large number of lawsuits concerning a supervisor's role in a *Giglio* violation presents a direct and substantial risk of disrupting the functioning of the office of the prosecutor. "The presentation of such issues in a § 1983 action often would require a virtual retrial of the criminal offense in a new forum, and the resolution of some technical issues by the lay jury." *Imbler*, 424 U.S. at 425. For instance, respondent would be required to prove that the failure to create procedures and regulations and to supervise and train in their use caused a non-disclosure of material evidence. See, *e.g.*, *Hartman* v. *Moore*, 547 U.S. 250, 260 (2006); *Crawford-El* v. *Britton*, 523 U.S. 574, 593 (1998); see also *Coyne* v. *Taber Partners I*, 53 F.3d 454, 460 (1st Cir. 1995) ("causation questions are both factbound and case-specific").

One causation issue, for example, that could routinely arise in a case challenging *Brady* or *Giglio* policies is whether a given prosecuting attorney's non-disclosure was based on his own prosecutorial judgments in the case, the lack of adequate supervision, or the absence of adequate policies or procedures. The rule adopted by the court of appeals would place line prosecutors in an untenable position vis-a-vis their supervisors. If the line prosecutor, who presumably would be immune in all events, admitted that he made an actual judgment not to

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[7] The threat of such lawsuits would, of course, be magnified if the court of appeals' decision were extended to suits challenging other prosecutorial policies, such as the handling of capital prosecutions, witnesses, grand juries, indictments, and plea negotiations. See generally *U.S. Attorneys' Manual* tit. 9 (June 2008).

disclose, that would foreclose any claim against the supervisors because of a lack of causation between the supervisors' alleged omissions and the non-disclosure. Such a concession, however, would potentially subject the line prosecutor to professional sanctions by the court or his licensing bar. Supervisors, on the other hand, would have substantial litigation and institutional interests in establishing that their existing policies and procedures are fully adequate and appropriate. Such potential conflicts of interest would be enormously disruptive to prosecutors' offices and prosecutors thus could be "hampered in exercising their judgment * * * by concern about resulting personal liability." *Imbler*, 424 U.S. at 426.

Suits such as respondent's would interfere with the office of the prosecutor in other ways. Those suits could involve "[t]he prosecutor's possible knowledge of a witness' falsehoods, the materiality of evidence not revealed to the defense, * * * [and] the likelihood that prosecutorial misconduct so infected a trial as to deny due process." *Imbler*, 424 U.S. at 425. Respondent's claims would also involve prosecutorial deliberations made by the District Attorney, his chief deputy, other prosecutors in the District Attorney's Office who had dealings with Fink, as well as the attorneys who prosecuted respondent and who unquestionably are entitled to absolute immunity. "Defending these decisions, often years after they were made, could impose unique and intolerable burdens upon a prosecutor responsible annually for hundreds of indictments and trials." *Id.* at 425-426.

Even if a case against a supervisor does not proceed to trial, the burdens of discovery, including the produc-

tion of documents and potential depositions of prosecutors, would significantly disrupt the function of the office of the prosecutor. *E.g.*, *Harlow* v. *Fitzgerald*, 457 U.S. 800, 817-818 (1982) ("burdens of broad-reaching discovery" are "peculiarly disruptive of effective government"). And if supervisory prosecutors lost absolute immunity whenever the acts of prosecutors were allegedly traceable to their actions (or inactions), few prosecutors would willingly accept a job as a supervisor. Cf. *Robertson* v. *Sichel*, 127 U.S. 507, 515 (1888) ("Competent persons could not be found to fill [supervisory] positions * * * if they knew they would be held liable for all the torts and wrongs committed by a large body of subordinates, in the discharge of duties which it would be utterly impossible for the superior officer to discharge in person.").

"The affording of only qualified immunity to the [supervisory] prosecutor also could have an adverse effect upon the functioning of the criminal justice system." *Imbler*, 424 U.S. at 426. As this Court explained in *Imbler*, collateral proceedings brought by a defendant challenging his conviction should be "focused primarily on whether there was a fair trial under law." *Id.* at 427. "This focus should not be blurred by even the subconscious knowledge that a post-trial decision in favor of the accused might result in the prosecutor's being called upon to respond in damages for his error or mistaken judgment." *Ibid.* "The possibility of personal liability also could dampen the prosecutor's exercise of his duty to bring to the attention of the court or of proper officials all significant evidence suggestive of innocence or mitigation." *Id.* at 427 n.25. Those principles apply with special force in a case like this. Respondent successfully

collaterally attacked his conviction by establishing that he was wrongfully convicted. The criminal justice system would not have been well-served if those collateral proceedings had been influenced by concerns about exposure of prosecutors to personal liability.

2. Qualified immunity is not an adequate substitute for absolute immunity for a supervisory prosecutor, and nothing justifies protecting line prosecutors absolutely, while exposing their supervisors to a greater hazard of liability. The defense of absolute immunity "defeats a suit at the outset," *Imbler*, 424 U.S. at 419 n.13, without regard to whether the law was "clearly established" at the time of the challenged conduct. *Harlow*, 457 U.S. at 818. Qualified immunity can also be denied or delayed if there are disputed questions of fact. See, *e.g.*, *Johnson* v. *Jones*, 515 U.S. 304, 319-320 (1995). Such delay and litigation does not occur in cases involving absolute immunity because such suits are dismissed at the outset when the complaint alleges that the prosecutor violated his duties as a prosecutor.

Absolute immunity thus discourages suits from being brought and effectively brings to a rapid conclusion those suits that are brought. The prophylactic effect from defeating such suits at the outset goes to the heart of the rationale for absolute immunity, which seeks to avoid "harassment" and "a deflection of the prosecutor's energies." *Imbler*, 424 U.S. at 423 (quoting *Pearson* v. *Reed*, 44 P.2d 592, 597 (Cal. Dist. Ct. App. 1935)). "If a prosecutor had only qualified immunity, the threat of § 1983 suits would undermine performance of his duties no less than would the threat of common-law suits for malicious prosecution." *Id.* at 424. Thus, "the alterna-

tive of qualifying a prosecutor's immunity would disserve the broader public interest." *Id.* at 427.

A rule that denies supervisory prosecutors absolute immunity from claims that they allegedly violated a constitutional duty, like the disclosure obligation in *Giglio* that applies in all criminal cases, would have enormous adverse repercussions. Supervisors, such as petitioners in this case, are charged with the establishment of policies for the prosecution of all criminal cases in their offices. That essential prosecutorial function would be hamstrung by subjecting supervisors to what could be a barrage of personal damages actions over prosecutorial policies and judgments.

3. Absolute immunity from personal damages liability does not leave supervisory prosecutors immune from other sanctions that deter prosecutorial misconduct and punish wrongdoers. As an initial matter, *Giglio* itself provides a strong incentive to establish robust policies favoring disclosure. As discussed, although the prosecution does not have a duty to establish any particular system for storing or sharing of impeachment information within an office, a prosecutor who fails to gather and disclose material impeachment information in the hands of other prosecutors for whose knowledge he is accountable violates *Giglio* and the conviction will be reversed as a result. Supervisory prosecutors thus have every incentive to establish policies and procedures that ensure that prosecuting attorneys comply with the dictates of *Giglio*. Moreover, as is the case with a line prosecutor, supervisory "prosecutors are subject to professional discipline, public censure, and perhaps even criminal penalties for unsavory acts." *Haynesworth*, 820 F.2d at 1270; accord *Imbler*, 424 U.S. at 429.

Prosecutorial offices also often have their own internal mechanisms to address prosecutorial misconduct and ensure that prosecutors, including supervisors, meet the highest standards of ethical misconduct. In the federal system, for instance, the Office of Professional Responsibility (OPR) within the Department of Justice reviews and investigates allegations of prosecutorial misconduct, see *United States* v. *Hasting*, 461 U.S. 499, 506 n.5 (1983), often including alleged violations of *Brady*, *Giglio*, or discovery obligations under Rule 16 of the Federal Rules of Criminal Procedure. Office of Professional Responsibility, U.S. Dep't of Justice, *Fiscal Year 2004 Annual Report* 1 (*OPR Annual Report*) <http://www.usdoj.gov/opr/annualreport2004.htm>; see, *e.g.*, *United States* v. *Derrick*, 163 F.3d 799, 803 (4th Cir. 1998).

OPR has jurisdiction over all Department of Justice attorneys. Where investigation substantiates an allegation of professional misconduct, OPR recommends a range of disciplinary action appropriate to the conduct. *OPR Annual Report* 2. Supervisory prosecutors, from first line supervisors through Criminal Chiefs and First Assistants, are subject to the full range of disciplinary actions available under the law, from reprimand through suspension and removal. *U.S. Attorneys' Manual* § 3-4.752 (Nov. 2007).

Furthermore, once a disciplinary action is final, OPR notifies the bar counsel in each jurisdiction in which an attorney found to have committed professional misconduct is licensed. The bar referral policy includes findings of intentional professional misconduct, as well as findings that an attorney acted in reckless disregard of a professional obligation or standard. *OPR Annual Re-*

port 2-3. Accordingly, a wide range of sanctions ensures that supervisory prosecutors fulfill their ethical duties and special role in the criminal justice system.

CONCLUSION

The judgment below should be reversed.

Respectfully submitted.

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JULY 2008

AMICUS CURIAE BRIEF

102

No. 07-854

IN THE

Supreme Court of the United States

JOHN VAN DE KAMP, *et al.*,

Petitioners,

—v.—

THOMAS LEE GOLDSTEIN,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION, THE ACLU OF SOUTHERN CALIFORNIA, THE ACLU OF NORTHERN CALIFORNIA AND THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICI*[1]

The American Civil Liberties Union ("ACLU") is a nationwide, nonprofit, nonpartisan organization with more than 500,000 members dedicated to the principles of liberty and equality embodied in the Constitution and this nation's civil-rights laws. The ACLU of Northern California and the ACLU of Southern California are regional affiliates of the National ACLU. Since its founding in 1920, the protection of due process rights and the vindication of constitutional rights more generally have been the central concern of the ACLU, which has appeared before this Court in numerous cases implicating these rights and the fairness of the criminal justice system, both as direct counsel and as *amicus curiae*. Proper resolution of the legal issues raised by this case is therefore a matter of substantial concern to the ACLU and its members.

The National Association of Criminal Defense Lawyers (NACDL) is a nonprofit organization with more than 12,000 direct members and 35,000 affiliate members from all 50 states. Founded in 1958, NACDL promotes research in the field of criminal law, disseminates and advances knowledge relevant to that field, and encourages integrity, independence, and expertise in criminal defense

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[1] Pursuant to Rule 37.3, letters of consent from the parties have been submitted to the Clerk of the Court. Pursuant to Rule 37.6, counsel for *amici* states that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici*, their members or their counsel made a monetary contribution to its preparation or submission.

practice. The American Bar Association recognizes NACDL as an affiliated organization with full representation in the ABA House of Delegates. NACDL routinely files amicus briefs on various issues, including the prosecutorial duty to disclose exculpatory information, in this Court and other courts.

STATEMENT OF THE CASE

Goldstein's Arrest and Wrongful Conviction

On November 16, 1979, Respondent Thomas Lee Goldstein, a 30-year-old Marine Corps veteran and engineering student living in Long Beach, California, was arrested for the shooting death of John McGinest. J.A. 21, 27-28. There was no forensic or physical evidence linking Goldstein to the shooting, nor any evidence that Goldstein had ever had contact with McGinest. J.A. 23. None of the eyewitnesses' descriptions of the shooter matched Goldstein. J.A. 24.

What the police did have were two dubious pieces of evidence. The first was a purported identification that the police elicited from Loran Campbell, an eyewitness, by suggestion and intimidation. J.A. 26, 52.

The second—and much more damning—piece of evidence was the testimony of Edward Fink, a heroin addict, recidivist, and jailhouse informant. J.A. 29. Fink had worked as an informant for the Long Beach Police Department for the previous ten years, giving police the concocted "confessions" of others and receiving benefits in exchange. Knowing Fink's tendency to hear confessions from his

cellmates, Long Beach police officers purposely transferred him to Goldstein's jail cell. J.A. 30. After a single night alone with Goldstein, Fink told the police that Goldstein had confessed the murder to him. J.A. 30-31. The police knew that Fink had simply made the confession up. J.A. 31.

The prosecution nonetheless allowed Fink to testify—without correction—that he had heard Goldstein confess to the crime. J.A. 32, 35. Fink also testified that he had received no benefit for testifying against Goldstein and had never received any benefits in the past for cooperating with law enforcement. J.A. 37. Fink perjured himself. The truth was that he had received numerous benefits during his decade-long stint as an informant, and in exchange for his false testimony against Goldstein had received a very nice deal: three years of probation with only two months of incarceration for grand theft, J.A. 38, 42, plus the dismissal of another theft charge, J.A. 39-40. Goldstein was convicted of murder.

Administrative Recklessness in the District Attorney's Office

Fink was allowed to commit perjury because the Deputy District Attorney handling Goldstein's prosecution did not know—*could not* know—of the benefits Fink had received for his testimony. Petitioners, who were then the District Attorney and Chief Deputy District Attorney of Los Angeles County and the administrative chiefs of the office, had put no system in place by which line prosecutors could learn of the deals struck with informants. J.A. 45-46. This, despite knowing that the introduction of

perjurious testimony by jailhouse informants was a significant systemic problem for the office. J.A. 44. In fact, even before Goldstein's prosecution Petitioners had considered creating a system to keep track of the benefits given to informants, but never did so. J.A. 46. Ten years later, when a Los Angeles County grand jury issued a report on the misuse of jailhouse informant testimony, it concluded that the District Attorney's Office had been guilty of a "deliberate and informed disinclination to take the action necessary to curtail the misuse." J.A. 50.

Goldstein Wins Release and Initiates This Action

Throughout his imprisonment, Goldstein maintained his innocence and challenged his conviction. J.A. 22. Finally, in May 2002, during an evidentiary hearing in federal district court on his petition for habeas corpus, Goldstein had an opportunity to present evidence and testimony showing that Fink had perjured himself during his trial and had received benefits for his assistance. J.A. 52-53. The district court granted the writ, and the court of appeals affirmed. J.A. 54, 55.

Despite all that had been revealed, the District Attorney's Office attempted to retry Goldstein. Unsuccessful, the State finally released him more than 24 years after his arrest. J.A. 58-60.

In December 2005, Goldstein filed this civil rights action against Petitioners, among others. J.A. 15-16. Petitioners claimed they were entitled to absolute immunity and moved for dismissal on that ground alone. Pet. App. 18. The district court, however, concluded that their failure to create any

information-sharing system about informants to which line prosecutors could have access was a derogation of administrative, not prosecutorial duties. Petitioners were therefore not entitled to absolute immunity. Pet. App. 18-20. On appeal, the Ninth Circuit affirmed. Pet. App. 15. Rehearing *en banc* was denied, Pet. App. 23, Petitioners petitioned for *certiorari*, and this Court granted the petition. 128 S. Ct. 1872 (2008).

SUMMARY OF ARGUMENT

Thomas Goldstein's wrongful conviction and 24-year incarceration expose a disturbing but little-recognized aspect of the American criminal justice system: its substantial, largely unregulated reliance on informants. The primary guarantor of due process—and the central check against wrongful conviction at the hands of lying informants—is the prosecutorial obligation to collect and disclose impeachment material about them. *See Giglio v. United States*, 405 U.S. 150 (1972). But the Deputy District Attorneys who prosecuted Goldstein could not fulfill their *Giglio* duties because their office had no system whatsoever to record potential impeachment information about jailhouse informants and disseminate it to line prosecutors. Respondent's merits brief persuasively explains why Petitioners' deliberate and informed refusal to create even the most rudimentary information management system for informant impeachment material was an administrative, rather than prosecutorial, decision, and so is not entitled to absolute immunity. *Amici* will not repeat those points here. This brief will instead refute Petitioners' public-policy arguments

and demonstrate that the information-management system that could have averted Goldstein's 24-year nightmare is a crucial piece of a larger institutional commitment to the fairness and integrity of the criminal justice system.

1. Contrary to Petitioners' arguments, *see, e.g.*, Pet. Br. 33-37, the public-policy concerns that led this Court in *Imbler v. Pachtman*, 424 U.S. 409 (1976), to adopt absolute immunity for prosecutorial functions militate against absolute immunity in this case. Petitioners' deliberate refusal to institute *any* information-management system *at all* for informant impeachment material exhibits an indifference to *Giglio* obligations far beyond the pale. Expanding absolute immunity to encompass such a complete derogation of this important administrative duty would significantly impede the fair operation of the criminal justice system.

2. Although informants pervade criminal prosecutions, their unreliability, their incentives to lie, and indeed their very existence commonly evade documentation, regulation, discovery, and judicial scrutiny.

3. Because due process disclosure requirements are the primary structural mechanism to regulate the use of informants, the integrity of the criminal justice system depends upon prosecutors' obtaining, recording, and disclosing informant impeachment material.

4. The significance of Petitioners' administrative dereliction here must be understood in the context of the pervasive structural obstacles faced by a defendant seeking *Giglio* material. Much police

and prosecution interaction with informants is never revealed. While Goldstein's administrative-duty claim would be unavailable to defendants suffering typical *Giglio* violations, these additional systemic impediments illustrate why the remedy Goldstein seeks here—though available only in very limited circumstances—is critical to the integrity of the criminal justice system.

5. Given the many structural barriers to discovery and judicial scrutiny, remedies for nondisclosure of *Giglio* material are all the more important. Yet such remedies as do exist are difficult to obtain and necessarily affect the outcome of only the immediate defendant's case. They are therefore insufficient to motivate or deter the actors—like Petitioners here—singularly able to create at least some sort of office-wide information-management system to handle informant material.

6. Allowing only qualified rather than absolute immunity for the administrative function at issue here will not open the floodgates to vexatious litigation. Claims like Goldstein's, while important because of the critical structural interests at stake, will lie only in the rarest circumstances.

7. Finally, this Court should decline the invitations of Petitioners' *amici* to decide issues not raised or ruled upon below. Deciding the municipal-liability question would be particularly inappropriate given that the municipal defendants are not even parties before this Court.

ARGUMENT

I. GRANTING ABSOLUTE IMMUNITY HERE WOULD UNDERMINE THE INTEGRITY AND FAIRNESS OF THE CRIMINAL JUSTICE SYSTEM.

The immunities available under 42 U.S.C. § 1983 are grounded upon those historically accorded at common law and the public-policy rationales underlying them. *Imbler v. Pachtman*, 424 U.S. 409, 420. Petitioners bear the heavy burden of showing that public policy requires extending absolute immunity to these circumstances. *Butz v. Economou*, 438 U.S. 478, 506 (1978). It is the "'judicial process itself,'" not "any special 'esteem for those who perform [prosecutorial] functions,'" that provides the basis for absolute prosecutorial immunity. *Kalina v. Fletcher*, 522 U.S. 118, 127 (1997) (quoting *Malley v. Briggs*, 475 U.S. 335, 342 (1986)).

This Court's concern for the integrity of the criminal adjudicatory process has driven prosecutorial-immunity jurisprudence since its inception in *Imbler*. Because the threat of potential personal civil liability for prosecutors acting in their role as advocate creates incentives at odds with a fair adjudicatory process, "[t]he ultimate fairness of the operation of the system itself could be weakened by subjecting prosecutors to section 1983 liability." *Imbler*, 424 U.S. at 427; *see also id.* at 423 (specifying the need to avoid "an adverse effect upon the functioning of the criminal justice system" and obstruction of "the system's goal of accurately determining guilt or innocence"); *id.* at 427 n.25 (expressing concern that § 1983 doctrine not

"dampen the prosecutor's exercise of his duty to bring to the attention of the court or of proper officials all significant evidence suggestive of innocence or mitigation"); *id.* at 427-28 (seeking to protect the performance of the prosecutorial duty, which is "essential to the proper functioning of the criminal justice system"). These policy concerns, though, have quite different implications for Petitioners' deliberate inaction here.

The office-wide administrative decision at issue in this case is significantly attenuated from any litigation decision prosecutors, acting as advocates, make in individual cases. Line prosecutors will not be deterred from zealous advocacy by the knowledge that chief administrators—their supervisors—can be held liable for failing to provide them with a basic component of office infrastructure.

At the same time, Petitioners' bid for absolute immunity has dangerous implications for the integrity of the criminal justice system. This is true *not* because chief administrators commonly refuse to create at least some sort of information-management system for informant material—indeed, the kind of derogation present here is undoubtedly rare—but rather because Petitioners' dereliction strikes at the very heart of due process protections. While informants pervade the criminal justice system, their use is largely undocumented, unregulated and free from judicial oversight. *Giglio*'s disclosure requirement is virtually the only systemic check against constitutional abuses of this nature. And yet line prosecutors unable to know themselves whether impeachment material exists cannot determine what ought be disclosed to defendants. Nor can those

defendants—absent exceptional luck, resources, and perseverance—hope independently to discover the existence of such material and avail themselves of mid-trial sanctions or post-conviction remedies. In short, when chief administrators exhibit the deliberate and informed indifference to *Giglio* obligations apparent here, the structure for ensuring due process breaks down.

The threat of potential personal civil liability against chief administrators under these remarkable circumstances is one of the very few structural checks that can deter and correct this devastating administrative omission and the rarely discovered due process violations that will inevitably result.

II. THE USE OF INFORMANTS PERVADES THE CRIMINAL JUSTICE SYSTEM.

Informants play a central role at virtually every stage of the criminal process. They are used to investigate suspects surreptitiously, generate arrests, obtain warrants, gain entry into homes without warrants, and conduct electronic surveillance at the discretion of police in lieu of court-sanctioned surveillance. *See Illinois v. Gates*, 462 U.S. 213, 243-45 (1983) (informant tip constituted sufficient basis for issuance of warrant); *United States v. White*, 401 U.S. 745, 752-53 (1971) (wired informant could be sent into defendant's home to conduct electronic surveillance without a warrant); *Hoffa v. United States*, 385 U.S. 293, 302-03 (1966) (police informant permitted to enter and collect information in private hotel room although police would have needed warrant to do so); *Draper*

v. United States, 358 U.S. 307, 312-13 (1958) (informant tip formed adequate basis for arrest).

Informants also testify as witnesses at hearings and trials. Their unreliability in this capacity is notorious. A recent study by the Northwestern University School of Law's Center on Wrongful Convictions disclosed that 45.9% of all wrongful capital convictions in the United States resulted from the lying testimony of an informant, making "snitches the leading cause of wrongful convictions in U.S. capital cases." Rob Warden, Ctr. on Wrongful Convictions, N.W. Univ. Sch. of Law, THE SNITCH SYSTEM: HOW SNITCH TESTIMONY SENT RANDY STEIDL AND OTHER INNOCENT AMERICANS TO DEATH ROW 3 (2004). University of Michigan Law School Professor Samuel Gross's study on exonerations likewise reports that nearly fifty percent of wrongful murder convictions involved perjury by someone such as a "jailhouse snitch or another witness who stood to gain from the false testimony." Samuel R. Gross et al., *Exonerations in the United States 1989 Through 2003*, 95 J. Crim. L. & Criminology 523, 543-44 (2005); *see also* Alexandra Natapoff, *Beyond Unreliable: How Snitches Contribute to Wrongful Convictions*, 37 Golden Gate U. L. Rev. 107, 108 (2006) ("The usual protections against false evidence, particularly prosecutorial ethics and discovery, may thus be unavailing to protect the system from informant falsehoods precisely because prosecutors themselves have limited means and incentives to ferret out the truth.").

Informing has become an increasingly important aspect of plea negotiations and

sentencing, as more and more defendants choose to become informants rather than face the full consequences of their actions. Cooperation agreements have become a routine aspect of—or even a substitute for—plea agreements, though lacking many safeguards traditionally accompanying the plea process. Graham Hughes, *Agreements for Cooperation in Criminal Cases*, 45 Vand. L. Rev. 1, 3 (1992) ("Cooperation agreements are exotic plants that can survive only in an environment from which some of the familiar features of the criminal procedure landscape have been expunged.").

Federal criminal law is expressly designed to create informants. Under 18 U.S.C. § 3553(e), a government motion stating that a defendant has provided "substantial assistance" is, in virtually all cases, the sole basis upon which a court can impose a sentence below the statutory mandatory minimum. *See, e.g.*, *Wade v. United States*, 504 U.S. 181, 185-86 (1992) (government's refusal to file motion under § 3553(e) reviewable only if based on unconstitutional motive such as race); *see also* U.S.S.G. § 5C1.2 (permitting sentence below statutory minimum in rare cases). Similarly, under the U.S. Sentencing Guidelines, the "substantial assistance" provision of U.S.S.G. § 5K1.1 is the single largest source of departures from the guidelines. Bureau of Justice Statistics, U.S. Dep't of Justice, Sourcebook of Criminal Justice Statistics 2006 tbl. 5.36.2006 (2007) (hereinafter Bureau of Justice Statistics, Sourcebook 2006), *available at* http://www.albany.edu/sourcebook/pdf/t5362006.pdf. This deliberate feature of criminal procedure has made the creation of informants a driving force in federal criminal law

enforcement over the past two decades. *See* Ian Weinstein, *Regulating the Market for Snitches*, 47 Buff. L. Rev. 563, 573 (1999).

No one knows with certainty how many informants are in the system at any given time, because police and prosecutors are not obligated to keep track. But countless wiretaps and search warrants are issued every year based on information from informants. *See, e.g.*, Laurence A. Benner & Charles T. Samarkos, *Searching for Narcotics in San Diego: Preliminary Findings from the San Diego Search Warrant Project*, 36 Cal. West. L. Rev. 221, 239 (2000). In 2006, fifteen percent of all federal defendants received cooperation credit for providing information about others, Bureau of Justice Statistics, Sourcebook 2006, *supra*, tbl. 5.36.2006, and it has been estimated that more than twice that number actually provide information although they may receive no documented reward, Linda Drazga Maxfield & John H. Kramer, U.S. SENTENCING COMM'N, SUBSTANTIAL ASSISTANCE: AN EMPIRICAL YARDSTICK GAUGING EQUITY IN CURRENT FEDERAL POLICY AND PRACTICE 9-10 (1998). Particularly in drug enforcement—an arena constituting the lion's share of both federal and state dockets—the use of criminal informants is ubiquitous. Bureau of Justice Statistics, Sourcebook 2006, *supra*, tbl. 5.36.2006; Bureau of Justice Statistics, U.S. Dep't of Justice, Sourcebook of Criminal Justice Statistics 2004 tbls. 5.44.2004 & 5.45.2004 (2005), *available at* http://www.albany.edu/sourcebook/tost_5.html. As U.S. District Judge Marvin Shoob once noted, "I can't tell you the last time I heard a drug case of any substance in which the government did not have at

least one informant. Most of the time, there are two or three informants, and sometimes they are worse criminals than the defendant on trial." Mark Curriden, *The Informant Trap: Secret Threat to Justice*, Nat'l L.J., Feb. 20, 1995, at A1.

In sum, rewarding criminals in exchange for information or testimony is an important feature of the American criminal process, from investigations to arrests to trial to sentencing. *See* Alexandra Natapoff, *Snitching: The Institutional and Communal Consequences*, 73 U. Cin. L. Rev. 645, 645-46 (2004) ("The use of criminal informants in the U.S. justice system has become a flourishing socio-legal institution unto itself."). The administrative mechanisms by which this practice is documented, regulated, and disclosed to defendants and to courts are thus critically important to the integrity of the criminal justice system.

III. *GIGLIO* DISCLOSURE REQUIREMENTS ARE THE PRIMARY STRUCTURAL MECHANISM BY WHICH THE CRIMINAL JUSTICE SYSTEM MONITORS AND REGULATES THE USE OF INFORMANTS.

In *Giglio v. United States*, 405 U.S. 150 (1972), this Court held that defendants are constitutionally entitled, as a matter of due process, to know of any inducements for informants to testify against them, since this information can be critical to impeaching the informants' testimony. The prosecution in *Giglio* "failed to disclose an alleged promise made to its key witness that he would not be prosecuted if he testified for the Government." *Id.* at 151. This Court

explained that "nondisclosure of evidence affecting credibility" falls under the rule of *Brady v. Maryland*, 373 U.S. 83, 87 (1963), requiring disclosure to the defense. Because the informant's "credibility as a witness was . . . an important issue in the case, . . . evidence of any understanding or agreement as to a future prosecution would be relevant to his credibility and the jury was entitled to know of it." *Giglio*, 405 U.S. at 154-55. *Giglio* and *Brady* recognize that without disclosure of the processes by which the government creates informant witnesses, and especially the inducements provided to them, the adversarial process is unfairly one-sided and opaque: without disclosure, defendants cannot adequately protect themselves against, and be sure juries and courts know about, informants' biases and misrepresentations.

Moreover, as this Court made clear in *Kyles v. Whitley*, 514 U.S. 419 (1995), the obligations established in *Giglio* are the means by which the criminal justice system ensures that prosecutors disclose to the defense all material information the police possess, not just information actually and personally known by the trial prosecutor:

> The prosecution, which alone can know what is undisclosed, must be assigned the consequent responsibility to gauge the likely net effect of all such evidence and make disclosure when the point of "reasonable probability" is reached. This in turn means that the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police.

Id. at 437-38; *see also Banks v. Dretke*, 540 U.S. 668, 693 (2004) (reaffirming this duty as articulated in *Kyles*); *Strickler v. Greene*, 527 U.S. 263, 280-81 (1999) (same). Criminal informants are typically managed by police officers or investigative agents. These officers control access to and communication with informants and have the most information about them. Defendants' constitutional rights to obtain exculpatory information concerning informants depend entirely upon prosecutorial diligence in acquiring this information from the police. Moreover, the requirement that prosecutors "gauge the likely net effect of all such evidence" presupposes that they have some mechanism for gathering it. Prosecutorial office-wide systems for memorializing and sharing this information are thus the primary safeguard not only against prosecutorial non-disclosure, but police non-disclosure as well.

This Court recognized the symbiotic relationship between constitutionally mandated disclosure and the legitimacy of informant use in *Hoffa v. United States*, 385 U.S. 293 (1966). In rejecting a due process challenge to the practice of compensating informant witnesses, this Court explicitly based its holding on the understanding that the informant would eventually be cross-examined in front of a properly instructed jury. *Id.* at 311 ("The established safeguards of the Anglo-American legal system leave the veracity of a witness to be tested by cross-examination, and the credibility of his testimony to be determined by a properly instructed jury."). *Hoffa*'s holding presupposes that defendants will receive all exculpatory impeachment evidence concerning informants, and that juries will

hear full cross-examinations of informants based upon that information. *Hoffa* upheld the constitutionality of using and rewarding informant witnesses, but only given the assumption that prosecutorial offices have mechanisms for collecting and providing the *Brady/Giglio* material necessary to a proper cross-examination. Without such safeguards, the very use of informant witnesses fundamentally threatens due process. *See Banks*, 540 U.S. at 701 (noting that this Court "has long recognized the 'serious questions of credibility' informers pose," and reversing denial of habeas relief in part because "[t]he jury . . . did not benefit from customary, truth-promoting precautions that generally accompany the testimony of informants" (quoting *On Lee v. United States*, 343 U.S. 747, 757 (1952))).

In this as in other areas, the criminal procedure system of checks is backwards-looking. Courts impose the exclusionary rule after the fact to induce police to comply with the Fourth Amendment. *Mapp v. Ohio*, 367 U.S. 643, 656 (1961). Likewise, courts enforce *Brady/Giglio* disclosure obligations after the fact—often long after the interactions of informants with police and prosecutors have taken place—to encourage and compel the lawful and responsible creation and handling of informant witnesses. Because police are not otherwise required to disclose their negotiations with informants, *Brady/Giglio* compliance is the central mechanism to ensure that the government collects and discloses information about how it uses and rewards informants. The system thus relies on the disclosure associated with the adversarial trial process to check

the accuracy and integrity of the police investigative process and prosecutorial negotiations about information. Darryl K. Brown, *The Decline of Defense Counsel and the Rise of Accuracy in Criminal Adjudication*, 93 Cal. L. Rev. 1585, 1588-89 (2005). The investigative process of creating informants is itself almost completely unregulated. The threat of eventual disclosure, however, serves as one of the few structural inducements to law enforcement to strive for reliability. Without at least some sort of information-management system in place for the prosecutorial collection and disclosure of this material, the entire process breaks down.

IV. DESPITE CONSTITUTIONAL REQUIREMENTS, *GIGLIO* INFORMATION FREQUENTLY REMAINS UNDOCUMENTED AND UNDISCLOSED.

The significance of Petitioners' administrative dereliction must be understood in the context of the pervasive structural obstacles facing a defendant who seeks *Giglio* material. This broader context includes the all-too-frequent failure by police as well as prosecutors to record and disseminate information about their interactions with informants. While Goldstein's administrative-duty claim would be unavailable to defendants aggrieved by these more typical failures, their widespread existence illustrates why the remedy Goldstein seeks—though available only in very limited circumstances—is nonetheless critical to the integrity of the criminal justice system.

A. *Giglio* Information Concerning Police Interaction and Communication with Informants Is Often Unrecorded or Withheld from Prosecutors.

The U.S. Department of Justice and the FBI—taken together, comprising one of the nation's largest handlers of informants—have long recognized that the collection of information about informants by law enforcement is crucial to their use. The Attorney General has imposed comprehensive guidelines that regulate the FBI's recruitment, reward, and monitoring of its 15,000 informants. *See* U.S. Dep't of Justice, Attorney General's Guidelines Regarding the Use of FBI Confidential Human Sources (Dec. 13, 2006), *available at* http://fas.org/irp/agency/doj/fbi/chs-guidelines.pdf.

For example, before recruiting a new informant, FBI agents are required to "document [the informant's] motivation for providing information or assistance, including any consideration sought from the government for this assistance," and "any promises or benefits, and the terms of such promises or benefits, that are given a Confidential Human Source by the FBI, [prosecutor] or any other law enforcement agency (if known, after exercising reasonable efforts)." *Id.* at 13. The agent must forward that documentation to a supervisor. *Id.* Agents must also document all payments made to informants, *id.* at 29, any crimes that informants are authorized to commit in the course of their cooperation, and make written findings justifying that authorization, *id.* at 30-32. *See also id.* at 37

(requiring documentation any time an agent has reason to believe that an informant has violated the authorization). Every informant file must be reviewed annually. *Id.* at 17.[2]

In its budgetary request for fiscal year 2008, the FBI sought $13 million to create a new monitoring database for its informants, asserting that such close monitoring was necessary to the integrity of the information process, because "without the personnel necessary to oversee the [monitoring system], the FBI will be unable to effectively ensure the accuracy, credibility, and reliability of information provided by more than 15,000 [informants]." Fed. Bureau of Investigation, FY 2008 Authorization and Budget Request to Congress 4-24 (2007), *available at* http://www.usdoj.gov/jmd/2008justification/office/33_01_justification.doc. By its own admission, then, the United States apparently believes that the responsible use of informants in criminal cases requires system-wide recordkeeping and that such

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[2] The United States tells only part of the story in its assertion that it is "not aware of any United States Attorney's Office in the country that has established the database contemplated by respondent." Br. of Amicus United States at 22. The Attorney General, functionally equivalent to Petitioners here in his administrative responsibility for implementing office-wide systems, *has* imposed record-keeping obligations on the FBI so that individual subordinate U.S. Attorneys can meet their *Brady* obligations. *See* U.S. Dep't of Justice, United States Attorneys' Criminal Resource Manual § 9-2052, *available at* http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/crm02052.htm.

recordkeeping is not inherently "prosecutorial" but may be delegated to investigative agencies.

Unfortunately, many state and local police departments lack the systems and procedures of the FBI, making the maintenance of information about informants highly localized and contingent. Whereas the FBI keeps extensive files and records regarding its informants, local police precincts may keep none at all, and may not share information about informants' previous criminality. *See, e.g.*, Letter of Am. Civ. Liberties Union of N. Cal. to John Van De Kamp, Chair of the California Commission on the Fair Administration of Justice 4-6 (Sept. 19, 2006), *available at* http://ccfaj.org/documents/reports/jailhouse/expert/ACLU%20Letter%20re%20Informants.pdf (documenting findings of survey of 111 law enforcement agencies across the state).

When a police officer confronts a potential suspect, the decision to negotiate over arrest and liability, the conversations that influence a suspect to provide information, the kinds of information discussed, and the implicit promises or representations made during those conversations typically remain unrecorded. *See* Jerome Skolnick, JUSTICE WITHOUT TRIAL: LAW ENFORCEMENT IN DEMOCRATIC SOCIETY 133 (1966) ("[Police reports] will not, if possible, reveal that an informant was used at all."); Randall Coyne, *Dead Wrong in Oklahoma*, 42 Tulsa L. Rev. 209, 215 n.76 (2006) ("More often than not, the key to a defense victory lies not in what appears in a police report but what is omitted from a police report. Police investigators have no legal duty to put all information they gather into written reports.").

This unchecked discretion and lack of documentation continues through the relationship between police handlers and their informants, influencing not only the kinds of promises that are made but also the kinds of information elicited. *See, e.g.*, Rhonda Cook, *Chain of Lies Led to Botched Raid*, Atlanta J.-Const., Apr. 27, 2007, at D1 (police relied on bad tip from drug dealer to raid home of innocent 92-year-old Kathryn Johnston who was killed during raid); *see also Joint Oversight Hearing on Law Enforcement Confidential Informant Practices Before the Subcomms. on Crime, Terrorism, and Homeland Sec. and on the Constitution, Civil Rights, and Civil Liberties of the H. Comm. on the Judiciary*, 110th Cong., 1st Sess. 4-5 (2007), *available at* 2007 WL 2084166 (statement of Rep. Robert C. Scott, Chairman of Subcomm.). Once this information is created, it is very difficult to trace it back to its origins or check its accuracy. As one prosecutor put it, "the black hole of corroboration is the time that cooperators and agents spend alone." Ellen Yaroshefsky, *Cooperation with Federal Prosecutors: Experiences of Truth Telling and Embellishment*, 68 Fordham L. Rev. 917, 936 (1999).

Even informants who are used to obtain search warrants evade documentation. A typical warrant application will not disclose the identity of the information source, but will state that a "confidential informant" has provided the basis for probable cause. Benner & Samarkos, *supra*, at 239. Courts have come to accept this secrecy as legitimate protection for informants' identities, *see, e.g.*, *McCray v. Illinois*, 386 U.S. 300 (1967), and courts rarely require informants to appear in person to

substantiate their information, *see* Benner & Samarkos, *supra*, at 239; *see also United States v. Harris*, 403 U.S. 573, 584-85 (1971). As a result, the untold thousands of criminal informants who provide information to law enforcement and to the courts every year do so largely in secrecy and without public documentation.

All too often, police agencies fail to convey information regarding their informants to prosecutors. *See, e.g., Smith v. Sec'y of N.M. Dep't of Corr.*, 50 F.3d 801, 828 (10th Cir. 1995) (acknowledging likelihood of "circumstances where the prosecution possesses, either actually or constructively, *Brady* information that for some reason is not in the 'file,' such as material in a police officer's file (but not in the prosecutor's file) or material learned orally and not memorialized in writing"). This can happen for any number of reasons: police reluctance to reveal an informant's additional crimes, fear of losing a useful source, or even simple distrust of prosecutors. *See, e.g.*, Daniel Richman, *Prosecutors and Their Agents, Agents and Their Prosecutors*, 103 Colum. L. Rev. 749, 789 (2003). Given the prevalence of informants in so many arenas of law enforcement, such omissions significantly affect the availability of constitutionally mandated disclosures throughout the criminal process. For this reason, the ability of prosecutors' offices to collect and disseminate information from police is essential to the criminal justice system's institutional commitment to due process and *Giglio*'s promise that defendants are entitled to exculpatory impeachment information about the informants used to prosecute them.

B. Prosecutors' Communications with Informants Frequently Remain Undocumented and Prosecutors Themselves Often Resist Disclosure.

Prosecutors' negotiations with informants, like negotiations between informants and police, are rarely public. When a prosecutor orally promises not to file charges in exchange for information, that exchange will usually be known to only the prosecutor, the case agent, the cooperating informant, and his attorney. Daniel C. Richman, *Cooperating Clients*, 56 Ohio State L.J. 69, 119 (1995). Prosecutors may even have reduced incentives to collect and maintain *Giglio* information in the first place, because under *United States v. Ruiz*, 536 U.S. 622, 633 (2002), prosecutors are not constitutionally obligated to disclose such material in the more than 95% of criminal cases that are resolved by a guilty plea.[3]

Not only do the processes by which informants are created remain undocumented, but prosecutors also affirmatively deploy their discretion to hide the existence and identities of informants. *See, e.g.*, *Banks v. Dretke*, 540 U.S. 668, 676-77 (2004) (defense

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[3] In 2007, more than 96% of the convictions in federal court were by plea rather than trial. In 2004, approximately 95% of the convictions in state court were obtained the same way. Admin. Office of the U.S. Courts, 2007 Annual Report of the Director: Judicial Business of the United States Courts tbl. D-7 (2008), *available at* http://www.uscourts.gov/judbus2007/appendices/D07Sep07.pdf; Matthew R. Durose & Patrick A. Langan, U.S. Dep't of Justice, *Felony Sentences in State Courts, 2004*, Bureau of Justice Statistics Bull., July 2007, at 1, 2, *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/fssc04.pdf.

counsel sought information about a confidential informant, State resisted, and trial court refused to order information provided). Prosecutors may offer defendants advantageous plea deals, or even drop cases or permit their dismissal, in order to avoid disclosing the identity of an informant. *See, e.g.*, *People v. Borunda*, 522 P.2d 1 (Cal. 1974); *People v. Hulland*, 2 Cal. Rptr. 3d 919, 923 n.1 (Cal. Ct. App. 2003); *State v. Simmons*, 944 So. 2d 1122 (Fla. Dist. Ct. App. 2006); *State v. Clovis*, 807 P.2d 127 (Kan. 1991); *see also* Skolnick, *supra*, at 132-33. One state prosecutor in Illinois went so far as to retaliate against a motion to discover the identity of a confidential informant by refusing to negotiate any plea bargains in a series of cases involving other defendants and other defense attorneys; an appellate court permitted the practice. *See People v. Moore*, 804 N.E.2d 595, 597-98, 600 (Ill. App. Ct. 2003).

Whether impeachment information about an informant will be revealed to a defendant in Goldstein's position depends largely on the practices of individual prosecutors, who are not always as scrupulous as one might hope. For example, in *Banks*, this Court reversed the denial of a habeas petition where prosecutors

> withheld evidence that would have allowed Banks to discredit two essential prosecution witnesses. The State did not disclose that one of those witnesses was a paid police informant, nor did it disclose a pretrial transcript revealing that the other witness' trial testimony had been intensively coached by prosecutors and law enforcement officers.

540 U.S. at 675. The informant "asserted emphatically [at trial] that police officers had not promised him anything" for his testimony and that he had not spoken with police until a few days before trial. "These answers were untrue but the state did not correct them." *Id.* at 678. Only during federal habeas proceedings nineteen years later did the informant publicly reveal that he "set [the defendant] up" in order to help a police officer whom the informant feared would otherwise arrest him and from whom the informant received $200 for his help with the case. *Id.* Absolute immunity, of course, would protect the prosecutors in *Banks*.

When prosecutors fail to disclose informant information only the most tenacious and fortunate defendants can succeed in unearthing the information by other means, *see, e.g.*, *Bennett v. DEA*, 55 F. Supp. 2d 36 (D.D.C. 1999) (requiring release of information about informant only after Freedom of Information Act request), and sometimes not even then, *see, e.g.*, *Hidalgo v. FBI*, 541 F. Supp. 2d 250, 251 (D.D.C. 2008) (in inmate's FOIA suit for information about paid informant whose evidence helped convict requester, court noted that FBI "repeatedly rebuffed" the requester and "harried him from pillar to post"; court held that much of the information sought was nonetheless protected by FOIA exemptions), *appeal dismissed*, No. 08-5180, 2008 WL 2683861 (D.C. Cir. July 01, 2008).

Together, these dynamics mean that the bulk of the creation and handling of informants will evade discovery and judicial scrutiny. The police decision to arrest is almost never subject to judicial review, *see, e.g.*, *Town of Castle Rock v. Gonzales*, 545 U.S.

748, 760-61 (2005) (because of longstanding tradition of police discretion in arrests, police retained discretion even where statute's plain language made arrest mandatory). Nor is the prosecutorial decision to drop or levy charges. *See, e.g.*, *United States v. Armstrong*, 517 U.S. 456, 464 (1996) ("In the ordinary case, 'so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion.'" (quoting *Bordenkicher v. Hayes*, 434 U.S. 357, 364 (1978))). Because these processes of creating and negotiating with informants are discretionary, they are typically not subject to public or judicial scrutiny or to litigation.

To be sure, this case is not about the concealment of informants' identities because of plea deals, the misconduct of line prosecutors, or police or prosecutorial discretion. But the very existence of so many circumstances in which *Giglio* information slips through the cracks of the criminal justice system underscores the importance of information-sharing systems to promote disclosure. The variety and nature of the circumstances in which information about informants is concealed means that the creation and handling of informants will come to light only under the narrow circumstances where the government seeks to use the informant at trial—and sometimes not even then, if the information is not properly shared within the system. Because defendants have extremely limited opportunities to discover this essential information, information-management systems are all the more

vital. And, because absolute prosecutorial immunity shields nearly every *other* type of failure to disclose *Giglio* material, the concern for systemic fairness that justifies prosecutorial immunity *precludes* the extension of absolute immunity to Petitioners. *See also* Point I, *supra.*

V. THE POSSIBILITY OF § 1983 LIABILITY FOR CHIEF ADMINISTRATORS IS THE ONLY MEANINGFUL SAFEGUARD AGAINST STRUCTURAL FAILURES TO COMPLY WITH *GIGLIO* DUE PROCESS REQUIREMENTS.

The existence of non-litigatory safeguards against constitutional violations is a crucial consideration in this Court's absolute-immunity jurisprudence. For example, underlying this Court's carefully tailored decision in *Imbler v. Pachtman*, 424 U.S. 409 (1976), was the recognition that willful prosecutorial misconduct of the type implicated by Imbler's suit was subject to correction by means other than § 1983 lawsuits. Because prosecutors are subject to professional discipline and criminal sanctions for intentional violations of defendants' rights, the decision to grant prosecutors absolute immunity under certain circumstances "[did] not leave the public powerless to deter misconduct or to punish that which occurs." *Id.* at 429; *see also Butz v. Economou*, 438 U.S. 478, 513-16 (1978) (extending absolute immunity to federal administrative law judges because agency proceedings provide "many of the same safeguards as are available in the judicial process," such as adversary proceedings, a trier of fact insulated from political pressure, the right to

present evidence, and the right to agency or judicial review); *cf. Cleavinger v. Saxner*, 474 U.S. 193, 202, 204-06 (1985) (refusing to extend absolute immunity to members of a prison's discipline committee due to absence of "safeguards that reduce the need for private damages actions as a means of controlling unconstitutional conduct").

The types of safeguard that this Court has found sufficient to allow for absolute immunity in previous cases are glaringly absent here. Petitioners mechanistically invoke the types of deterrent sanctions discussed in *Imbler*, *see* Pet. Br. at 36, but unlike an intentional conspiracy to convict an innocent man, *see Imbler*, 424 U.S. at 415-16 (describing the plaintiff's allegations), the misconduct alleged here—the failure to develop any information-sharing system at all regarding jailhouse informants—does not subject Petitioners to professional or criminal sanctions. Bar disciplinary systems rarely call prosecutors to task even when courts overturn convictions for *specific acts* of willful misconduct in high-profile cases, *see* Letter of Am. Civ. Liberties Union of N. Cal. to John Van De Kamp, *supra*, so the chance of a district attorney's being disciplined years afterward for his office's failure to establish a *Giglio* compliance *system* is necessarily even more remote. In fact, it appears that neither Petitioners nor anyone else was ever disciplined for the scandalous state of affairs that led to Goldstein's wrongful conviction and 24-year incarceration, despite the 1990 conclusion of a civil grand jury that the "Los Angeles County District Attorney's Office failed to fulfill the ethical responsibilities of a public prosecutor by its

deliberate and informed declination to take the action necessary to curtail the misuse of jailhouse informant testimony." *Report of the 1989-90 Los Angeles County Grand Jury* at 6. Nor will this type of failure subject a prosecutor to criminal liability under the federal and California statutes discussed in *Imbler*, 424 U.S. at 429 & nn. 28, 29.[4]

Nor can the mere possibility that a few cases may be overturned for *Giglio* error in the far-distant future provide any meaningful incentive for a chief administrator to implement a *Giglio* system today, particularly since *Giglio* errors, unlike trial errors that are often apparent in the courtroom, *e.g.*, *Griffin v. California*, 380 U.S. 609, 615 (1965) (prosecutor cannot draw negative inference from accused's silence), may not be uncovered until many years after the fact. *See Imbler*, 424 U.S. at 443-44 (White, J., concurring) ("Unlike constitutional violations committed in the courtroom . . ., the judicial process has no way to prevent or correct the constitutional violation of suppressing evidence. The judicial process will by definition be ignorant of the violation when it occurs; and it is reasonable to suspect that most such violations never surface."); *see also, e.g.*,

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[4] Because the *Giglio* error asserted here results from a structural problem in the prosecutor's office, rather than individual misconduct, it is virtually certain that no one would be guilty of "willfully subject[ing]" a person to a deprivation of constitutional rights under 18 U.S.C. § 242. *Compare*. 42 U.S.C. § 1983 (liability for one who "subjects, or causes to be subjected"). Nor would prohibitions on the subornation of perjury such as the California Penal Code provision cited in *Imbler* apply. *See* Cal. Penal Code § 127 (criminalizing only the willful procurement of perjury); *see also People v. Brown*, 16 P. 1, 3 (Cal. 1887).

Banks v. Dretke, 540 U.S. 668, 682-86 (2004) (defendant could not substantiate *Brady* claim until nineteen years after his trial); Warden, *supra*, at 3, 4, 6, 8, 10, 12 (listing years spent in prison before exoneration by each of 47 people wrongfully convicted because of dishonest informants; 32 of the listed individuals spent more than five years in prison). In Goldstein's case, by the time he obtained habeas relief, more than two decades after his wrongful conviction, Petitioner Van de Kamp had left the District Attorney's Office, served two terms as California Attorney General, and entered private practice.

Additionally, any individual or group asking a federal court for an injunction to require a prosecutor's office to institute an information-sharing system will face significant obstacles under this Court's justiciability and abstention doctrines. *See, e.g.*, *O'Shea v. Littleton*, 414 U.S. 488, 495-96 (1974); *Younger v. Harris*, 401 U.S. 37, 41 (1971). Finally, Petitioners' suggestion that the electoral process provides a meaningful check against elected prosecutors' administrative failings with respect to their *Giglio* obligations, Pet. Br. at 36, is purely fanciful, given the Herculean efforts and extended length of time typically necessary for *Giglio* violations to come to light and the likelihood that the officeholders responsible for the violations will, like Petitioner Van de Kamp, be long out of office by that time. For this reason alone, Petitioners' citation to *Tenney v. Brandhove*, 341 U.S. 367, 370-71 (1951) (absolute immunity for legislators' actions at public hearing), is inapposite. The other case Petitioners cite, *Mitchell v. Forsyth*, 472 U.S. 511 (1985),

actually distinguishes *Tenney* on precisely the ground urged here: whereas "[l]egislators are accountable to their constituents, and the judicial process is largely self-correcting" via "procedural rules, appeals, and the possibility of collateral challenges," there are no "[s]imilar built-in restraints" for the constitutional failings alleged in the instant case. *Id.* at 522-23 (citation omitted).

Given the importance of *Giglio* to the integrity of a criminal justice system deeply reliant on informant testimony, this Court should not grant absolute immunity and remove this singularly meaningful safeguard to enforce *Giglio* compliance.

VI. RESPONDENT'S CLAIM WILL NOT OPEN THE FLOODGATES TO VEXATIOUS LITIGATION BECAUSE IT WILL BE AVAILABLE ONLY IN RARE CIRCUMSTANCES.

Petitioners argue that, if this Court affirms the decision below, the threat of vexatious litigation would so chill prosecutors' conduct as to tempt them to forego the use of informants altogether. Pet. Br. 33-36. As Respondent's brief persuasively demonstrates, this concern is unfounded because Goldstein's claim is so narrow that "[i]t is hard to imagine any other scenario in which an information management decision like the one challenged here could lead to a lawsuit against a chief prosecutor." Resp. Br. 49. *See also* Resp. Br. 48-49 (listing *nine* conditions that must obtain for suit under Goldstein's theory to survive). And of course, *qualified* immunity will still be available to prosecutors acting in an administrative capacity.

Equally important, Petitioners' generalized invocation of *Imbler v. Pachtman*, 424 U.S. 409 (1976) masks the ill fit between the concerns reflected in that opinion and the realistic effects of permitting Goldstein's limited claim here—as Respondent notes, he does not allege that Petitioners designed an information-management system improperly, but rather that they refused to create *any* system *at all*. Resp. Br. 36.

Imbler held that absolute immunity was required because of the "concern that harassment by unfounded litigation would cause a deflection of the prosecutor's energies from his public duties, and the possibility that he would shade his decisions instead of exercising the independence of judgment required by his public trust." *Id.* at 423. Neither of these dangers is presented by Goldstein's suit. First, because of the extremely limited nature of the circumstances in which suits on his theory could be maintained, prosecutors would rarely have to answer such suits, and thus would suffer no distraction from their duties. Second, *Imbler* made clear that the "independence of judgment" to which it was referring concerned the judgment "both in deciding which suits to bring and in conducting them in court," *id.* at 424, and this is not at all the judgment that is implicated by Goldstein's suit.

Liability here implicates neither decisions about *which* cases are brought nor decisions about *how* they are brought. *Imbler*'s concern for the independence of prosecutors "[f]requently acting under serious constraints of time and even information," *id.* at 425, underscores this Court's appropriate focus on case-specific prosecutorial

decisions made in the heat of battle, as opposed to the type of generalized office-wide administrative decision at issue here. Petitioners' speculations about the chilling effect of Goldstein's lawsuit are not only far removed from this Court's rationale in *Imbler*, but they provide no basis to stretch that rationale to cover the instant case.

Finally, though *Imbler* rejected the qualified immunity alternative as insufficiently protective of prosecutorial functions, this Court has noted in the intervening years that "the qualified immunity standard is today more protective of officials than it was at the time that *Imbler* was decided. 'As the qualified immunity defense has evolved, it provides ample protection to all but the plainly incompetent or those who knowingly violate the law.'" *Burns v. Reed*, 500 U.S. 478, 494-95 (1991) (quoting *Malley v. Briggs*, 475 U.S. 335, 341 (1986)) (footnote omitted). Given the narrowness of Goldstein's theory of relief, and its significant attenuation from the day-to-day decisions concerning which cases to prosecute and how to prosecute them, qualified immunity is protection enough from meritless suits.

VII. THIS COURT SHOULD NOT ADDRESS ISSUES NOT RAISED OR RULED UPON BELOW, OR ISSUES CONCERNING PARTIES NOT BEFORE THIS COURT.

Finally, this Court should resist the suggestions of various *amici* to dispose of this case by deciding questions never addressed below. The United States urges the question whether Goldstein's complaint states a claim on the merits. *See* Br. of Amicus United States 9 (acknowledging

that courts below assumed rather than decided that Goldstein stated a claim for a constitutional violation, but arguing nonetheless that *Giglio* imposes no "wholesale obligation" on supervisory prosecutors to develop appropriate procedures). Similarly, the City of New York asks this Court to rule on the question whether municipalities can be liable for the type of constitutional violation Goldstein alleges. *See* Br. of Amicus City of New York 16-22 (urging this Court to disapprove a sixteen-year-old decision on municipal liability, *Walker v. City of New York*, 974 F.2d 293 (2d Cir. 1992), cited only in a footnote in the decision below).

The decision under review here addressed only the immunity issue and neither of the other issues pressed by *amici*. *See* 481 F.3d at 1172. This Court, as usual, need not reach out to decide these issues.[5] Rather, as it has before, this Court should decide the immunity question under the assumption that the complaint states a claim. *See Buckley v. Fitzsimmons*, 509 U.S. 259, 261 (1993).

New York City's suggestion that this Court rule on municipal liability is especially strained, because the parties who would be directly implicated by such a ruling—the municipal defendants Goldstein sued—are not among the Petitioners before the Court. Finally, New York's substantive position that a prosecutor's various functions cannot be separated, *see* Br. of Amicus New York City 21-22

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[5] *See, e.g., Whitman v. Dep't of Transp.*, 547 U.S. 512, 514-15 (2006); *Cooper Indus., Inc. v. Aviall Servs., Inc.*, 543 U.S. 157, 168-69 (2004); *Lee v. Kemna*, 534 U.S. 362, 387-88 (2002); *Glover v. United States*, 531 U.S. 198, 205 (2001).

("Distinguishing legal liability for acts performed in an actual prosecution from a district attorney's policy-making for initiating and presenting prosecutions is both artificial and impossible."), completely ignores this Court's functional approach to the absolute immunity question, *see, e.g.*, *Buckley*, 509 U.S. at 269, and its explicit recognition that prosecutors *can* be policy-making officials whose unconstitutional actions subject a municipality to liability, *see Pembaur v. City of Cincinnati*, 469, 473, 484-85 (1986) (holding municipality subject to liability for unconstitutional conduct directed by a county prosecutor). This Court should not address the issue at all, much less upset its own precedent in order to resolve what is apparently New York City's private grievance with a decision not under review.

CONCLUSION

The integrity of the criminal process demands that prosecutors collect and disclose the history of jailhouse informants, their relationship with the government, and in particular the promises and rewards that influence the information they provide. The criminal justice system's institutional commitment to due process is fundamentally undermined when prosecutors' offices lack any system at all to collect and disclose this information. *Amici* respectfully ask the Court to affirm the judgment below.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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No. 07-854

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IN THE
SUPREME COURT OF THE UNITED STATES

JOHN VAN DE KAMP and CURT LIVESAY,

Petitioners,

v.

THOMAS LEE GOLDSTEIN,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

AMICUS CURIAE BRIEF OF THE CITY OF NEW YORK IN SUPPORT OF PETITIONERS

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No. 07-854

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INTEREST OF THE *AMICUS CURIAE*

Pursuant to Rule 37.4, the City of New York (the "City") submits this *amicus curiae* brief in support of petitioners who seek reversal of the judgment in *Goldstein v. City of Long Beach*, 481 F.3d 1170 (9th Cir. 2007), *cert. granted sub nom. Van de Kamp v. Goldstein*, __U.S.__, 128 S. Ct. 1872 (2008).

The Ninth Circuit's decision erroneously fails to extend absolute immunity to the former District Attorney in Los Angeles County and a senior-level prosecutor for their actions in establishing office-wide policies for ensuring truthful testimony and for the dissemination of confidential informant information. Such policies, however, constitute substantive prosecutorial work which is intimately related to the judicial phase of criminal proceedings under *Imbler v. Pachtman*, 424 U.S. 409 (1976).

The Ninth Circuit relied on a precedent of the United States Court of Appeals for the Second Circuit, *Walker v. City of New York*, 974 F.2d 293 (2d Cir. 1992), *cert. denied*, 507 U.S. 961, 507 U.S. 972 (1993), which was wrongly decided. *Walker* created a legal fiction, purporting to distinguish a District Attorney's managerial functions, which circumvented absolute immunity in order to allow a plaintiff to sue for 42 U.S.C. § 1983 damages against the City. However, the City has no control over the prosecutorial work of the five District Attorney's offices within its borders.

In particular, the City of New York is a municipal corporation organized and existing under the laws of the State of New York. Michael R. Bloomberg is the Mayor and the City's chief executive officer. N.Y.C. Charter, §§ 3, 8.

The City stands in a unique position with respect to the five District Attorney's offices within its borders, although there is no question that the City has no control over the prosecutorial functions of the offices. Rather, the Governor and Attorney General have broad powers to remove, supervise

and supersede district attorneys' prosecutorial functions, but no county or City official has such powers.

Under New State law, the district attorney is a constitutional officer, chosen by the electors of each county (N.Y. Const., art. XIII, § 13[a]), charged by statute with the duty of conducting "all prosecutions for crimes and offenses cognizable by the courts of the county for which he or she shall have been elected . . . ." N.Y. County Law, § 700(1) (McKinney 2004); *see also* N.Y. County Law, § 927 (McKinney 2004) (describing general duties of district attorneys).

Only the Governor of the State may remove a district attorney (N.Y. Const., art. XIII, § 13(a)) or appoint a replacement if there is a mid-term vacancy in the office. N.Y. County Law, § 926(2) (McKinney 2004). Indeed, although New York City has the authority to abolish the offices of most county officials, it has no such authority with respect to the District Attorney's Office. N.Y. Const., art. XIII, § 13(c).[1]

In addition, N.Y. Exec. Law, § 63(2) (McKinney 2008 Cum. Pkt. Part), gives the Governor the power to supersede a district attorney, stating that, whenever required by the

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[1] *See also* N.Y. Pub. Off. Law § 31(1)(e) (Consol. 2005) (district attorney must submit resignation to the Governor); *id.*, § 34(2) (authorizes the Governor to direct a district attorney to assist in conducting an investigation and hearing in any proceeding for the removal of a public officer); *id.*, § 43 (permits the Governor to fill vacancies in the office of a district attorney until the next election).

Governor, the attorney general shall attend, manage and conduct criminal proceedings in any Supreme Court or before any grand jury. In that situation, the Attorney General "shall exercise all the powers and perform all the duties in respect of such actions or proceedings, which the district attorney would otherwise be authorized or required to exercise or perform," while "the district attorney shall only exercise such powers and perform such duties as are required of him by the attorney-general or the deputy attorney-general so attending." *See also Matter of Johnson v. Pataki*, 655 N.Y.S.2d 463 (N.Y. App. Div. 1997), *aff'd*, 691 N.E.2d 1002 (N.Y. 1997).

The district attorney alone is responsible for appointing and removing assistant district attorneys in his/her office. N.Y. County Law, § 930 (McKinney 2004).[2]

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[2] The New York County District Attorney's Office investigates and prosecutes approximately 100,000 criminal cases annually and employs close to 500 Assistant District Attorneys, making it one of the largest law firms, public or private, in the nation. http://manhattanda.org/officeoverview/ (last visited July 2, 2008). *See also* http://www.brooklynda.org/office/employment.htm (last visited July 2, 2008) (Kings County District Attorney's Office "is one of largest and busiest offices in the nation, serving over two million residents . . . ."); http://www.bronxda.net/frames.html (last visited July 2, 2008) (the Bronx County District Attorney's Office employs nearly 400 assistant district attorneys); http://www.queensda.org/career.html (last visited July 2, 2008) (Queens County District Attorney's Office employs approximately 300 Assistant District Attorneys); http://rcda.nyc.gov/ (last visited July 2, 2008) (describing office of the Richmond County (Staten Island) District Attorney).

For a few purposes not involving control or direction of the office, New York State law home rule provisions classify district attorneys as local rather than state officers, *see, e.g.*, *Kelly v. McGee*, 443 N.E.2d 908, 913 (N.Y. 1982); N.Y. Pub. Off. Law, § 2 (Consol. 2005) ("the term 'local officer' includes every other officer who is elected by the electors of a portion of the state, a subdivision or municipal corporation of the state and every officer limited in the execution of his functions only to a portion of the state."). The district attorneys' minimum annual salary is set by the legislature, N.Y. County Law § 928 (McKinney 2004), although the district attorneys are paid by the City (the five counties are geographical subdivisions of the City).

These provisions, however, do not change the City's total lack of control over the district attorneys' prosecutorial functions in fulfillment of their prosecutorial obligations.

Thus, New York law is clear that its cities cannot be held liable for the decisions and conduct of members of the District Attorney's Office in the furtherance of their duties as prosecutors. *See, e.g.*, *Brown v. City of New York*, 458 N.E.2d 1250, 1251 (N.Y. 1983) (where plaintiff sued the City for, *inter alia*, malicious prosecution, and moved for summary judgment, the New York Court of Appeals held that it was error to apply the doctrine of issue preclusion to the civil case, based on issues decided in the criminal case, because the City and the district attorney's office are separate entities and do not stand in sufficient relation to establish the key element of identity of the parties); *McGinley v. Hynes*, 412 N.E.2d 376, 380-81 (N.Y. 1980), *cert. denied*, 450 U.S. 918 (1981) (noting

distinct aspects of district attorneys' prosecutorial and other functions, and holding that when a prosecuting a criminal matter, district attorney acts on behalf of the State).[3]

Notwithstanding, a decision by the U.S. Court of Appeals for Second Circuit in 1992 created substantial confusion in this area which continues to this day. *See Walker v. City of New York*, 974 F.2d 293 (2d Cir. 1992), *cert. denied*, 507 U.S. 961, 507 U.S. 972 (1993) ("*Walker*"). *Walker* was one of the key precedents cited by the Ninth Circuit.

The City urges, as have other courts and commentators, that *Walker* was wrongly decided and created a legal fiction which allowed a plaintiff to sue for 42 U.S.C. § 1983 damages against the City when the City has no control over the five District Attorney's offices within its borders. Thus, in order to circumvent the absolute immunity afforded prosecutors in their prosecutorial functions, including prior to actual presence in the courtroom, the Second Circuit drew a purported distinction, for purposes of *Monell* liability, between policy, training and supervisory functions and prosecutorial functions. Specifically, the *Walker* Court found that allegations of a failure to train district attorneys to avoid withholding exculpatory *Brady* material, was a sufficient basis for the City to be a proper § 1983 defendant.

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[3] *See also Lee v. City of Mt. Vernon*, 407 N.E.2d 404, 404 (N.Y. 1980) (in suit against the city and various individuals for malicious prosecution, the Court of Appeals stated that "the decision [whether] to present the matter to the Grand Jury was that of the District Attorney, for whose acts the City *is not responsible* . . . .") (emphasis added).

However, as discussed below, in *Goldstein*, as in *Walker*, the acts complained of are not simply administrative practices and procedures regarding such areas as personnel hiring or resource allocation, but rather the acts complained of involve primary prosecutorial decisions on how and what policies will govern and what training will be provided with respect to key prosecutorial functions. These include decisions concerning ensuring that testimony is truthful and the use of confidential informant information. Such decisions are ones which this Court has consistently found to require independent, apolitical judgment by prosecutors in order to pursue prosecutions on behalf of the State without fear of harassment and endless litigation over their decisions.

Affirmance of the Ninth Circuit's decision, which declined to extend absolute immunity to such decisions by prosecutors, will have serious adverse ramifications for the effective functioning of criminal prosecution systems, state and federal. It will send a strong signal that every case is open to second-guessing, even decades later, as in this case. In the worst case, the attraction to government service in the form of serving as an independent prosecutor will be dampened.

Furthermore, endorsing a rule which eviscerates absolute immunity based on a fiction which was created to circumvent the requirements of *Monell v. New York City Dept. of Social Services*, 436 US. 658, 694 (1978) ("*Monell*") is unwise. It will extend the negative ramifications of *Walker* throughout the country and adversely affect

municipalities which will be severely impacted fiscally for actions over which they have no control. To the extent that the Ninth Circuit's decision rests on a Second Circuit decision which has created a plethora of confused decision-making, it is also extremely important for the decision to be overturned.

Therefore, for all the above reasons, the outcome of this case is of vital importance to the City.

SUMMARY OF THE ARGUMENT

The Ninth Circuit's decision is erroneous, resting on an incorrect analysis of the functions at issue and the governing legal principles. Senior level prosecutors' establishment of a policy for ensuring truthful testimony and dissemination of criminal informant information is an integral prosecutorial advocacy function. Pursuant to *Imbler v. Pachtman*, 424 U.S. 409 (1976), a prosecutor is entitled to absolute immunity under 42 U.S.C. § 1983 for conduct that is "intimately associated with the judicial phase of the criminal process," *id.* at 430, which "occur[s] in the course of his [or her] role as an advocate for the State," *Buckley v. Fitzsimmons*, 509 U.S. 259, 279 (1993).

Indeed, the primary legal underpinning of the Ninth Circuit's decision is a single case from the Second Circuit involving harsh facts which resulted in deeply-flawed reasoning, which defies both *Imbler* and the controlling requirements for municipal liability under 42 U.S.C. § 1983. *See Goldstein*, 481 F.3d at 1176 n.2, citing *Walker v. City of New York*, 974 F.2d 293 (2d Cir. 1992), *cert.*

denied, 507 U.S. 961, 507 U.S. 972 (1993). *See also Carter v. City of Philadelphia*, 181 F.3d 339, 351-52 (3d Cir. 1999) (citing *Walker*), *cert. denied sub nom. Roe v. Carter*, 528 U.S. 1005 (1999). The City will demonstrate that, properly applying the principles of *Imbler* and progeny, *Walker* was wrongly decided, as evidenced by this Court's decision five years later in *McMillian v. Monroe County*, 520 U.S. 781 (1997).

Finally, the adverse consequences of failing to grant absolute immunity are self-evident, just as they were in *Imbler*. The desired independent judgment will be undermined if, at every corner, the district attorney and other supervisors face litigation over ongoing policy decisions, with respect to how to prepare and present cases in the courtroom, including training and supervision with respect thereto, on behalf of the people of the state.

ARGUMENT

A PROPER ANALYSIS OF THE FUNCTIONS OF DISTRICT ATTORNEYS IN ESTABLISHING OFFICE-WIDE POLICIES FOR THE PREPARATION, INITIATION AND PRESENTATION OF CASES IN THE COURTROOM, AND CORRESPONDING TRAINING AND SUPERVISION, DEMONSTRATES THAT THEY ARE ENTITLED TO ABSOLUTE IMMUNITY.

UNDER *IMBLER V. PACHTMAN*, 424 U.S. 409 (1976) AND *McMILLIAN V. MONROE COUNTY*, 520 U.S. 781 (1997), RELIANCE ON *WALKER V. CITY OF NEW YORK*, 974 F.2D 293 (2D CIR. 1992), *CERT. DENIED*, 507 U.S. 961, 507 U.S. 972 (1993), WAS MISPLACED, WHERE *WALKER* CREATED A LEGAL FICTION WHICH HELD THE CITY LIABLE FOR "MANAGERIAL" ACTIONS OF DISTRICT ATTORNEYS OVER WHICH IT HAS NO CONTROL.

A. Absolute prosecutorial immunity should be found for supervisory prosecutors who establish office-wide policies for use by prosecutors in their quasi-judicial functions.

This Court takes a functional approach to the question of whether prosecutors are absolutely immune from liability under 42 U.S.C. § 1983. "[C]onduct in 'initiating a prosecution and in presenting the State's case,' ... insofar as that conduct is 'intimately associated with the judicial phase of the criminal process'" is entitled to such immunity. *Imbler v. Pachtman,* 424 U.S. 409, 420, 423, 430-431 (1976).

The rationale for conferring absolute immunity is that "[t]he public trust of the prosecutor's office would suffer if he were constrained in making every decision by the consequences in terms of his own potential liability in a suit for damages." *Id.* at 424-25. *See post,* Sub. C. However, the *Imbler* Court had "no occasion to consider whether like or similar reasons require immunity for those aspects of the prosecutor's responsibility that cast him in the role of an administrator or investigative officer rather than that of advocate." *Id.* at 430-31.

Using a functional analysis,[4] this Court has held that "A prosecutor's administrative duties and

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[4] A reviewing court will look to "the nature of the function performed, not the identity of the actor who performed it, and the Court seeks to evaluate the effect that exposure to particular forms of liability would likely have on the appropriate exercise of those functions." *Forrester v. White,* 484 U.S. 219, 224 (1988). *See Burns v. Reed,* 500 U.S. 478, 484-86 (1991); *Malley v. Briggs,* 475 U.S. 335, 342-343 (1986); *Harlow v. Fitzgerald,* 457 U.S. 800, 807, 810-11 (1982).

those investigatory functions that do not relate to an advocate's preparation for the initiation of a prosecution or for judicial proceedings are not entitled to absolute immunity." *Buckley v. Fitzsimmons*, 509 U.S. 259, 269, 274-76, 278 (1993) (no absolute immunity for false statements in the public announcement of an indictment, or actions that are investigative in nature prior to a finding of probable cause to arrest because "[t]he conduct of a press conference does not involve the initiation of a prosecution, the presentation of the state's case in court, or actions preparatory for these functions"). *See also Kalina v. Fletcher*, 522 U.S. 118 (1997) (making false statements in an affidavit asserting that certain facts are true for an arrest warrant falls on investigative side of prosecutor's functions); *Burns v. Reed*, 500 U.S. 478, 492, 496 (1991) (prosecutor had absolute immunity for going into court and requesting arrest warrant, but only qualified immunity for the investigative act of approving hypnosis).

The argument that absolute immunity is limited to what prosecutors literally do within the courtroom as a "trial prosecutor" is baseless. In *Buckley*, this Court rejected this "extreme position" as foreclosed by the plain language of *Imbler*, which stated that the duties of prosecutors in their role as advocates for the State involve "'actions apart from the courtroom.'" *Buckley*, 509 U.S. at 272 (quoting *Imbler*, 424 U.S. at 431 n.33). Thus, "Acts undertaken by a prosecutor in preparing for the initiation of judicial proceedings or for trial, and which occur in the course of his role as an advocate for the State, are entitled to the protections of absolute immunity. Those acts must include the

professional evaluation of the evidence assembled by the police and appropriate preparation for its presentation at trial or before a grand jury after a decision to seek an indictment has been made." *Buckley*, 509 U.S. at 269.

In the instant case, pursuant to this Court's already signaled dividing line, the actions at issue are clearly on the prosecutorial advocacy side of the line, and not the police investigative side.

The particular functions — how and when to set substantive office-wide policies to ensure truthful testimony and use of confidential informant information — are core prosecutorial functions of the District Attorney and senior-level prosecutors. Such work goes hand-in-hand with training, monitoring and supervision of junior attorneys in their ongoing prosecutorial activities. Such conduct can fairly be characterized as closely associated with the conduct of litigation or potential litigation, *i.e.*, are intimately associated with the judicial phase of the criminal process. *Imbler*, 424 U.S. at 430.

In *Haynesworth v. Miller*, 820 F.2d 1245, 1269 (D.C. Cir. 1987) (*abrogated on unrelated point by Hartman v. Moore*, 547 U. S. 250 (2006)), the D.C. Circuit recognized that there is "no meaningful distinction between a decision on prosecution in a single instance and decisions on prosecutions formulated as a policy for general application." "Both practices involve a balancing of myriad factors, including culpability, prosecutorial resources and public interests" and "both procedures culminate in initiation of criminal proceedings against particular defendants, and in

each it is the individual prosecution that begets the asserted deprivation of individual rights." *Id.* at 1269; *Roe v. City & County of San Francisco*, 109 F.3d 578, 583-84 (9th Cir. 1997) (quoting same).

In this case, the Ninth Circuit recognized the propriety of absolute immunity for certain "supervisory liability cases with respect to "conduct closely related to prosecutorial decisions in the trial phase of [the plaintiff's] case, *Goldstein*, 471 F.3d at 1174, but then artificially constructed a nexus test requiring application to a specific individual prosecution case to trigger the immunity. *Id.* at 1175-76.

Such an artificial construction is unreasonable and unworkable. The Ninth Circuit's insistence on a specific factual predicate -- a nexus between the policy and the plaintiff (*i.e.*, the former criminal defendant) -- does not reasonably recognize the manner in which a District Attorney makes prudent policy decisions. The Ninth Circuit unfairly characterized the 'informant' policy as having a close connection "only to how the ... Office was managed, not to whether or how to prosecute a particular case or even a particular category of cases." *Id.* at 1176. The latter statement makes no sense because the challenged policy absolutely governs a substantive prosecutorial determination, and does not just a have a mere tangential effect such as a personnel policy would have.

As discussed below (*post*, Sub. C), moreover, as the elected official charged with representing the People, absolute immunity encourages a district attorney's prudent decision-making. It is of societal benefit, even if, for example, harsh consequences

ensue in an individual case where the desired foresight/planning does not anticipate every scenario.

While an office-wide policy can be characterized as "administrative," in the sense that it sets up a procedure, if the substantive component will affect a prosecution in a material way, then it falls within the contours of *Imbler*. Indeed, the *Goldstein* panel conceded that an act can be "prosecutorial in function but administrative in form," 481 F.3d at 1175, but improperly stopped the analysis there because the act at issue was not created in the specific context of a case. That was wrong: a policy (or non-policy) about sharing jailhouse informant information applies to every case in the office implicating such informants and thus is intimately associated with the judicial phase of the criminal process under *Imbler*. Furthermore, merely labeling the functions at issue "management" and "administrative" without addressing their unavoidably legal nature, was wrong. *Compare McMillian*, 520 U.S. at 786 (in separate context, cautioning against reliance on labels without further analysis).

If a decision is prosecutorial when made in connection with a specific case, it is no less so when made as part of a policy governing multiple cases.

In contrast to integral prosecutorial functions, commonly-denoted administrative functions include such areas as human resources, fiscal affairs, facilities management, procurement, management information and oversight of support staff. *Cf. Citizens for Responsibility & Ethics in Wash. v. Office of Admin.*, __ F.Supp.2d __, 2008

U.S. Dist. LEXIS 47333, ** 9-10, *42 (D.D.C. June 18, 2008). Such "administrative" acts are typically separated from the core work of a District Attorney's office, the core policies and actions which comprise the functions of initiating and presenting a criminal case. *See Forrester*, 484 U.S. at 227 (intelligible distinction between judicial actions and administrative acts which may occasionally need to be performed).

In sum, the functions involved are not simply the inherent administrative functions of any organization. Rather, they are inextricably linked to the prosecutorial advocacy courtroom functions in the judicial phase of the criminal process. To second-guess that independent prosecutorial decision-making, which will directly affect ongoing prosecutions, raises the same specter of liability that *Imbler* recognized would impede the vigorous and independent performance of the prosecutor's role. *See post*, Sub. C.

B. The Ninth Circuit's Reliance on *Walker v. City of New York* was Misplaced Because that Decision Employed Faulty Reasoning, Which is At Odds With *Imbler*, *Monell* and *McMillian v. Monroe County*, 520 U.S. 781 (1997).

In making its decision, the Ninth Circuit relied on the deeply-flawed *Walker* opinion, which defied not only *Imbler*, but also this Court's defining principles for municipal liability under 42 U.S.C. § 1983. *See Goldstein*, 481 F.3d at 1176 n.2, citing *Walker*, as well as *Carter v. City of Philadelphia*, 181 F.3d 339, 356 (3d Cir. 1999)

(which also relied on *Walker*). The City urges that, to the extent that *Walker* rejected absolute immunity for prosecutors involved in making policy for the conduct of criminal prosecutions and training therefor, and held that the City could be liable for such actions of district attorneys over which it has no control, *Walker* was wrongly decided.

To prevail on a claim under *Monell v. New York City Dept. of Social Services*, 436 US. 658, 694 (1978), a plaintiff must identify a policy or custom "resulting from the decisions of . . . those officials whose acts may fairly be said to be those of the municipality." *Board of the County Comm'rs of Bryan County v. Brown*, 520 U.S. 397, 403-404 (1997) ("*Bryan County*"). This Court has recognized that liability attaches *only* "when it can be fairly said that the city itself is the wrongdoer," *Collins v. City of Harker Heights*, 503 U.S. 115, 122 (1992), and not based on a theory of *respondeat superior* or vicarious liability. *City of Canton v. Harris*, 489 U.S. 378, 386-87 (1989). Where a plaintiff seeks to hold a municipality liable for constitutional torts committed by its agents, the plaintiff must "demonstrate that, through its deliberate conduct, the municipality was the 'moving force' behind the injury alleged." *Bryan County*, 520 U.S. at 404 (also detailing that "rigorous standards of culpability and causation must be applied").

In *Walker*, the Second Circuit held that the City of New York could be held liable under § 1983 for alleged failure to train assistant district attorneys to turn over exculpatory evidence to the defense and to avoid use of perjured testimony, even though the City has no control over the

District Attorney's offices in their prosecution of criminal cases. In brief, the extreme facts were that Walker had been convicted based upon police officers' and prosecutors' alleged cover-up of exculpatory evidence and perjury and he was imprisoned for nineteen years before he won his release by unearthing evidence that critically undermined the state's case against him. He then brought suit under § 1983, alleging that the City had failed to adequately train and supervise the assistant district attorneys to not suppress exculpatory evidence and that the City's failure to train constituted deliberate indifference to his constitutional rights, proximately causing his wrongful imprisonment.

Although the *Walker* Court correctly recognized that a district attorney in New York acts as a State officer when functioning as a prosecutor prosecuting crimes, *Walker v. City of New York*, 974 F.2d at 301 (citing *Baez v. Hennessy*, 853 F.2d 73, 77 (2d Cir. 1988), *cert. den. sub nom. Baez v. County of Onondaga*, 448 U.S. 1014 (1989)), the *Walker* Court went astray when it concluded that district attorneys have a split identity with respect to that very prosecutorial function. If a District Attorney acts in a quasi-judicial capacity in prosecuting a criminal matter, and therefore represents the State, the same District Attorney necessarily does so when formulating managerial policies and establishing training with respect thereto which are necessarily utilized in prosecuting criminal matters.

In order to find for plaintiff, the *Walker* Court simply avoided this by creating a fiction that "where a district attorney acts as the manager of

the District attorney's office, the district attorney acts as a county policymaker." *Id.* at 301. *Walker* failed to reconcile how the City could be liable under *Monell* for such conduct, when the City indisputably had no control thereof. In drawing such an artificial distinction, *Walker* improperly fosters an unrealistic and unsound notion that district attorneys are not directly and contemporaneously responsible for their offices' policies and actions. This does not comport with New York law nor with good policy.[5]

The fallacy of the *Walker* rationale is particularly evident under this Court's subsequent decision in *McMillian v. Monroe County*, 520 U.S. 781 (1997). This Court's cogent reasoning and close scrutiny of the official functions of the Sheriff's

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[5] The irony of the *Walker* decision is that, just a few years earlier in *Baez v. Hennessy*, the Second Circuit correctly held that prosecutorial acts of an elected district attorney in New York State "may not 'fairly be said to represent official policy' of the county" and, therefore, may not support a claim for § 1983 liability against the county. *Id.*, 853 F.2d at 76. The Court found that is "well established in New York that the district attorney, and the district attorney alone, should decide when *and in what manner* to prosecute a suspected offender." *Id.* at 77 (emphasis added). Similar to *McMillian*'s later analysis, the Court reviewed both the historical origins and current functions of prosecutors in New York State, and cited the following as the most decisive factors: the Governor may require the State Attorney General to take over the prosecution of any local criminal actions or proceedings; county residents may not remove a district attorney from office; the Governor may remove a district attorney from office and is also permitted to fill vacancies in the office by appointment; the Legislature sets the district attorney's salary; and a county has no right to establish a policy concerning how a district attorney should prosecute violations of State law. *Id.* at 76-77.

Office at issue in *McMillian*, renders the superficial artificial analysis rendered in *Walker* a nullity.

In particular, the petitioner in *McMillian* sued Monroe County, Alabama, for allegedly unconstitutional actions by the county sheriff leading to the petitioner's arrest, prosecution, conviction and incarceration. Agreeing that the sheriff was a policymaker under § 1983, the parties disputed only whether he played that role for Monroe County or the State of Alabama. *Id.*, 520 U.S. at 785. Rejecting a categorical approach, this Court held that, to determine whether an official acts in a State or local function, the courts should "ask whether governmental officials are final policymakers for the local government in a particular area, or on a particular issue," an inquiry dependent on a functional analysis of state law. *Id.* at 785. The analysis focused on control of the subject official, comparing the amount granted to the state with the amount granted to local authorities. *Id.* at 786-93.

McMillian's conclusion that the sheriff was a state official in the context at bar did not rest on a finding of complete control by state or local officials. Rather, examining Alabama law, the *McMillian* Court found (520 U.S. at 787-93):

- Alabama's constitution lists sheriffs as officials in the executive department;

- the governor may order impeachment proceedings against a sheriff, and sheriffs may be impeached by the Alabama supreme court;

- sheriffs must obey the orders of state courts;

- the county treasurers, unlike the state courts, have no authority to direct sheriffs to take specific actions;

- sheriffs are given complete authority to enforce the state criminal law in their counties;

- the county commissions have no authority to instruct sheriffs in how to perform their duties, whereas the governor and the attorney general can direct the sheriff to investigate any alleged violation; and

- the salaries of all sheriffs are set by the state legislature and not by the county commissions.

While finding several countervailing provisions, including the counties' payment of sheriffs' salaries, this Court found them insufficient to tip the balance (520 U.S. at 791):

> The county's payment of the sheriff's salary does not translate into control over him, since the county neither has the authority to change his salary nor the discretion to refuse payment completely.

As *McMillian* recognized, the key issues are direction and control. Despite the lack of such by the City, *Walker* created a fiction which does not accord with state law nor the functions that the District Attorneys are performing at the time. Distinguishing legal liability for acts performed in

an actual prosecution from a district attorney's policy-making for initiating and presenting prosecutions is both artificial and impossible. District attorneys' actions in training or supervision that relate directly to prosecutorial acts are inextricably intertwined with those acts, from both practical and logical perspectives (*see ante*, Sub. A), such that no different liability rule should pertain. Indeed, the decisions at issue are intimately related to the prosecutorial functions which, under *Imbler*, are shielded by absolute immunity in order to, *inter alia*, shield prosecutors from outside political influences. Thus, prosecutors are not municipal policymakers in the area of training, supervision and policy decisions.[6]

C. The Faulty Analysis in *Goldstein*, relying on *Walker*, Impedes the Effective Functioning of District Attorney's Offices.

The critical purposes served by absolute immunity will be served by reversal here. These purposes include removing the substantial threat of harassment by the overhanging cloud of litigation and interference with the independent functioning of the management of the district attorney's office

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[6] In *Pitts v. County of Kern*, 949 P.2d 920 (Cal. 1998), following the *McMillian* guidelines and rejecting the *Walker* analysis, the Supreme Court of California held that the California District Attorneys represent the state, not the county, when preparing and prosecuting criminal offenses, and when establishing policy and training employees in these areas. *Id.* at 935-36. , The *Pitts* Court found that "no meaningful analytical distinction can be made" between a district attorney's preparation and prosecution of criminal offenses and in training and developing policy in that area. *Id.* at 935.

and with the capacity to perform the duties the voters elected them to do.

As stressed in *Imbler*,

> The office of public prosecutor is one which must be administered with courage and independence. Yet how can this be if the prosecutor is made subject to suit by those whom he accuses and fails to convict? To allow this would open the way for unlimited harassment and embarrassment of the most conscientious officials by those who would profit thereby. There would be involved in every case the possible consequences of a failure to obtain a conviction. There would always be a question of possible civil action in case the prosecutor saw fit to move dismissal of the case . . . . The apprehension of such consequences would tend toward great uneasiness and toward weakening the fearless and impartial policy which should characterize the administration of this office. The work of the prosecutor would thus be impeded, and would have moved away from the desired objective of stricter and fairer law enforcement.

Id. at 423-24 (quotation, citation omitted). *See also Harlow*, 457 U.S. at 814 ("There is the danger that fear of being sued will "dampen the ardor of all but the most resolute, or the most irresponsible [public

officials], in the unflinching discharge of the duties.'" (citation omitted)); *Kalina*, 522 U.S. at 494; *see ante*, p. 11.

Compare Garcetti v. Ceballos, 547 U.S. 410, 423 (2006) (in separate context of public employee speech by a supervising deputy district attorney in the course of his official responsibilities, this Court recognized that sufficient discretion must be afforded employers to manage their operations; Court rejected permanent intrusive role for federal and state courts of mandated judicial oversight and displacement of managerial discretion); *Engquist v. Oregon Dept. of Agriculture*, 128 S. Ct. 2146 (2008) (expressing disinclination for governments to be forced to defend a multitude of equal protection class-of-one claims holding that the Equal Protection clause does not require "[t]his type of managerial discretion by judicial supervision" (citing *Garcetti*)).

Furthermore, prosecutors are government attorneys who act under the additional safeguards of rules of professional conduct and constitutional obligations. *See Garcetti*, 547 U.S. at 425-26 ("[T]hese imperatives, as well obligations arising from any other constitutional provisions and mandates of criminal and civil laws, . . . provide checks on supervisors who would order unlawful or otherwise inappropriate actions.").

Indeed, rather than devise an elaborate fiction, as was done in *Walker*, to circumvent the fact that the deputy district attorney engaged in criminal conduct, but could not be sued under 42 U.S.C. § 1983, the remedy would be a reversal of the conviction. *Cf. Giglio v. United States*, 405 U.S.

150, 154 (1972) (in reversing conviction for failure to turn over material evidence and ordering a new trial, this Court recognized that "the prosecutor's office is an entity" which acts on behalf of Government, *i.e.*, the State for which it pursues its prosecutorial duties). Other additional remedies include the potential of prosecuting for criminal conduct and pursuing professional licensing discipline mechanisms.[7]

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[7] In some instances, there are other potential remedies for deserving plaintiffs under state law. *See, e.g.*, N.Y. Ct. Cl. Act § 8-b (Consol. 2008) (claims for unjust conviction and imprisonment: creating a cause of action against the State of New York for those who can demonstrate, by clear and convincing evidence, that they were convicted and imprisoned for one or more felonies or misdemeanors, that their conviction was reversed and that the claimant did not commit the acts for which he was charged).

D. Summary.

For all the above reasons, the City respectfully urges reversal of the Ninth Circuit's judgment and dismissal of the action on grounds of absolute prosecutorial immunity.

CONCLUSION

THE NINTH CIRCUIT'S JUDGMENT SHOULD BE REVERSED.

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AMICUS CURIAE BRIEF

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In The Supreme Court of the United States

JOHN VAN DE KAMP and CURT LIVESAY,
Petitioners,
v.
THOMAS LEE GOLDSTEIN,
Respondent

On Writ of Certiorari
to the United States Court of Appeals
For the Ninth Circuit

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INTEREST OF *AMICUS CURIAE*[*]

The Constitutional Accountability Center (CAC) is a think tank, law firm and action center dedicated to fulfilling the progressive promise of the United States Constitution. Over the past decade, CAC's predecessor organization, Community Rights Counsel, filed numerous briefs in this Court and others in cases raising important questions of constitutional law. CAC continues this project by working with lawyers, government officials, and scholars to deepen understanding of the Constitution and to preserve the rights, freedoms and structural safeguards it secures.

The issue raised by this case goes to the core of CAC's mission: to assure that fundamental civil rights are protected and that all those who hold office under our Constitution are accountable to it.

INTRODUCTION AND SUMMARY OF ARGUMENT

The parties in this case ask the Court to once more clarify the line laid down in *Imbler* v. *Pachtman*, 424 U.S. 409 (1976), between those cases in which a State prosecutor is accorded absolute immunity from Section 1983 actions and ones in which he is afforded "only" qualified immunity. We agree with respondent that the judgment below was correct under this Court's existing case law. See *id.* at 430-31 (distinguishing "those aspects of the prosecutor's responsibility that cast him in the role

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[*]The parties have consented to the filing of this brief. Under Rule 37.6, *amicus* states no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

of an administrator * * * rather than that of advocate"); *Buckley* v. *Fitzsimmons*, 509 U.S. 259, 274 (1993) (denying absolute immunity for actions taken "before * * * probable cause" attached). But this brief urges the Court to consider a different course: to recognize that the *Imbler* decision was wrong when decided, is even more clearly so today, and that it must now correct that error.

As this Court's cases make plain, officials claiming absolute immunity for their unconstitutional acts should bear a heavy burden. See, *e.g.*, *Burns* v. *Reed*, 500 U.S. 478, 486 (1991). Doctrines of absolute immunity are antithetical to the principles of accountability and the rule of law that are at the core of our system of government. Indeed, the Framers of the Constitution saw civil suits against wrongdoing officers as a central mechanism for checking government abuses of power, and the Reconstruction Congress that enacted Section 1983 was, if anything, even more focused on assuring an effective remedy against government actors responsible for deprivations of individuals' constitutional rights.

In granting prosecutors absolute immunity, *Imbler* was not only out of step with constitutional first principles, but it was also wrong as a matter of statutory interpretation. The text of Section 1983, the legal background against which it was enacted, and the purposes the statute was meant to serve all make clear that the enacting Congress did not intend to confer such an immunity. Moreover, both *Imbler*'s interpretive method and its result place it at odds with this Court's later Section 1983 immunity case law, which recognizes the intent of the enacting Congress – and not modern-day policy judgments – as the sole legitimate authority for according absolute immunity.

Stare decisis principles do not support preserving the fundamentally flawed *Imbler* rule. As the opinions of this Court and the courts of appeals vividly attest, the *Imbler* regime has proved unworkable and irrational, spawning unnecessary collateral litigation and failing to deliver even the predictable, straightforward protection that was supposed to be its prime virtue. Moreover, intervening developments have undermined *Imbler*'s key legal and factual premises – chiefly, that *qualified* immunity would be insufficiently protective of honest prosecutors and that sanctions other than civil liability are adequate to uncover, correct, and punish prosecutors' abuse of their constitutional authority.

Given these realities, and the absence of any sort of justifiable reliance, *Imbler* immunity should discarded. A rule, erroneous when handed down and more clearly so today, that effectively strips Section 1983's protections from those whose liberty is unlawfully taken away by the most powerful class of local officials is due to be revisited. *Imbler*'s judge-made immunity, which unjustifiably extinguishes a cause of action the 42nd Congress plainly intended to be *available* to those deprived of constitutional rights, should not stand.

ARGUMENT

I. ABSOLUTE PROSECUTORIAL IMMUNITY IS INCOMPATIBLE WITH THE TEXT AND PRINCIPLES OF THE CONSTITUTION

A. Civil Suits Against Those Who Abuse Their Official Authority Are a Central Part of Our Constitutional Tradition

This Court has frequently recognized that rules of absolute immunity represent a stark departure from two bedrock principles reflected in our Constitution – that

"'where there is a legal right, there is also a legal remedy,'" *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 163 (1803) (quoting 3 W. BLACKSTONE, COMMENTARIES 23 (1783)), and that "[n]o man is this country is so high that he is above the law," *United States* v. *Lee*, 106 U.S. 196, 261 (1882).

As *Lee* and *Marbury* recognized, the principle that constitutional rights are enforceable through civil suits against wrongdoing officers is itself a vital part of the constitutional tradition.

At the time of the Founding, *ultra vires* acts by public officials were remedied through civil damages suits. See, *e.g.*, *Wilkes* v. *Wood*, 98 Eng. Rep. 489 (C.P. 1763) (successful suit under English common law of trespass for an unlawful search and seizure). If the allegedly trespassing official was found liable, he could be "made to pay compensatory and (in egregious cases) punitive damages (though he might well in turn be indemnified by the government)." AKHIL REED AMAR, THE BILL OF RIGHTS 70 (1998). Indeed, in the first steps toward independence, the Founding generation made sure to retain official liability: the First Continental Congress rebuffed parliamentary attempts to immunize from private damage suits government officials accused of wrongdoing. Declaration and Resolves of the First Continental Congress (1774), *reprinted in* DOCUMENTS OF AMERICAN HISTORY 84 (H. Commager 9th ed. 1973).

These civil suits were favored not only because they comported with the Framers' view about the nature of rights and their sense of corrective justice, but also because they advanced constitutional values of popular sovereignty and public accountability. Representing the power and voice of the people, in "both civil and criminal proceedings, the jury played a leading role in protecting

ordinary individuals against government overreaching." AMAR, BILL OF RIGHTS at 84. See I ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 293-94 (Vintage 1945) ("The jury system as it is understood in America [is] as direct and as extreme a consequence of the sovereignty of the people as universal suffrage").[1]

The text and structure of the Constitution and the Bill of Rights reflect this understanding. One of the principal purposes of the Bill of Rights was to place limits on the new federal government's power to search, arrest, and prosecute law breakers. The Fourth, Fifth, Sixth, and Seventh Amendments together aim to prevent abuse of the law enforcement power from the moment of investigation to adjudication. The Fourth Amendment constrains how police forces – our equivalent of eighteenth century constables – intrude on individual privacy and security in search of criminal activity. The Fifth and Sixth govern criminal prosecutions, imposing no less than eight distinct mandates to check prosecutorial overreaching.

Complementing these guarantees, the Seventh Amendment assumes that persons wronged by the law enforcement apparatus will have the right to bring their claim before a civil jury of their peers to redress unconstitutional conduct. Thus, for example, "the preferred vehicle for litigating the Fourth Amendment

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[1]Indeed, the epochal debate over whether to add the Bill of Rights was prompted by an objection that the original document had made no provision for juries in civil cases. *See* 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 587-88 (Max Farand rev. ed., 1937). *Cf.* THE FEDERALIST No. 83 (Hamilton) (1788) (noting that many states objected to the "want of a constitutional provision for trial by jury in civil cases").

was a tort suit brought by a citizen and tried before a Seventh Amendment jury of fellow citizens." AKHIL REED AMAR, THE CONSTITUTION AND CRIMINAL PROCEDURE 14-15, 162 (1997). Consistent with this constitutional understanding, during the nineteenth century, individual public officers were held strictly liable for violations of legal rights. See Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1486-87 (1987); *Osborn* v. *Bank of the United States*, 22 U.S. (9 Wheat.) 738, 839 (1824); *Little* v. *Bareme*, 6 U.S. (2 Cranch) 170, 179 (1804).[2]

This Court's cases reflect the critical role civil actions for damages play in our constitutional scheme. In *Lee*, the Court rejected the defendant officers' pleas for absolute immunity precisely because of the constitutional first principles demanding a civil remedy for violations of fundamental rights:

> Courts of justice are established, not only to decide upon the controverted rights of the citizens as against

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[2]To be sure, the framers of the Constitution were familiar with official immunities and provided members of Congress with a partial legislative immunity in the Speech or Debate Clause. Speech or Debate Clause immunity, however, has always had a limited effect on those injured: while "[t]he legislator who passes the law [has] absolute immunity, [the] * * * officer who enforces it does not," see John Jeffries, *The Right-Remedy Gap in Constitutional Law*, 109 YALE L.J. 87, 93 n.22 (1999). Thus, many of the Court's legislative immunity cases have *permitted* suit against the legislative officers who enforced the legislature's actions. See, *e.g. Powell* v. *McCormack*, 395 U.S. 486, 503-06 (1969); *Kilbourn* v. *Thompson*, 103 U.S. 168, 199-200 (1880); see also *Gravel* v. *United States*, 408 U.S. 606, 619 (1972) ("The Speech or Debate Clause could not be construed to immunize an illegal arrest even though directed by an immune legislative act"). The legislative immunity operates hand in hand with, and is dependent on, a rule of executive accountability.

> each other, but also upon rights in controversy between them and the government, and the docket of this court is crowded with controversies of the latter class. Shall it be said, in the face of all this * * * that the courts cannot give remedy when the citizen [whose] * * * estate [has been] seized and converted to the use of the government without any lawful authority, without any process of law, and without any compensation, because the president has ordered it and his officers are in possession? If such be the law of this country, it sanctions a tyranny which has no existence in the monarchies of Europe, nor in any other government which has a just claim to well-regulated liberty and the protection of personal rights.

106 U.S. at 221.

In upholding the jury verdict for the plaintiff, *Lee* considered the argument that "the possible interference of judicial action with the exercise of powers of the government essential to some of its most important operations," 106 U.S. at 221, required a different result, rejecting it on grounds of both principle and experience. Not only were these "supposed evils * * * small indeed compared to" the harm threatened to the rule of law, the Court explained, but such concerns are "much diminished, if they do not wholly disappear" when considered in light of experience; in "nearly a century under the present constitution," during which two foreign wars and a civil war had been fought, suits against officers had been "well established," resulting in "no injury * * * to th[e] government," *id.*

B. In Enacting Section 1983, The Reconstruction-Era Congress Ratified And Built Upon This Constitutional Tradition

In enacting Section 1983, the 42nd Congress built on this constitutional tradition by creating a federal damages remedy "to interpose the federal courts between the States and the people * * * – to protect the people from unconstitutional action under state law, 'whether that action be executive, legislative or judicial.'" *Mitchum* v. *Foster*, 407 U.S. 225, 242 (1972) (quoting *Ex Parte Virginia*, 100 U.S. 339, 346 (1880)). Cf. *Owen* v. *City of Independence*, 445 U.S. 622, 651-52 (1980) (noting that a "damages remedy against the offending party is a vital component of any scheme for vindicating cherished constitutional guarantees").

Written in sweeping terms, Section 1983 creates a cause of action against "every person" who under color of state law deprives another of "any rights, privileges, or immunities secured by the Constitution." Indeed, unlike the common law causes of action that had provided the means for holding wrongdoing officers accountable in pre-Civil War America, Section 1983 is directed squarely at the "'misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law.'" *Scheuer* v. *Rhodes*, 416 U.S. 232, 243 (1974) (quoting *Monroe* v. *Pape*, 365 U.S. 167, 184 (1961)). Thus, "government officials, as a class, could not be totally exempt, by virtue of some absolute immunity, from liability under its terms." *Id.*; *Imbler*, 424 U.S. at 434 (White, J., concurring) ("[T]o extend absolute immunity to any [class] of state officials is to negate pro tanto the very remedy which it appears Congress sought to create").

When the 42nd Congress was debating Section 1983, opponents objected that imposing liability on government officials for violating constitutional guarantees would result in their being "dragged to the bar of a distant and unfriendly court, and * * * placed in the pillory of vexatious, expensive, and protracted litigation, and heavy damages * * * ." Cong. Globe, 42nd Cong., 1st Sess. 365 (1871).

The supporters' response appealed to the familiar and accepted tradition of enforcing constitutional limitations. Section 1983, Senator Edmunds explained, simply "seeks to denounce[] * * * an unconstitutional act; and * * * endeavors to enforce the penalty imposed on that by the proper intervention of the judiciary," thereby ensuring that states and their officers "obey the will of the whole people expressed in the Constitution." Cong. Globe, 42nd Cong., 1st Sess. 691 (1871); see also *id.* at 482 ("[What legislation could be more appropriate than to give a person injured by another under color of such unconstitutional laws a remedy by civil action?").

In light of this historic practice of enforcing constitutional rights in civil damages actions and Section 1983's specific provision of a damages remedy to hold accountable state officers who violate constitutional guarantees, absolute immunities in Section 1983 litigation should be rare, and immunities limited to ones familiar to (and accepted by) those in the 42nd Congress who secured the statute's passage. This Court's cases have recognized as much. See *Burns*, 500 U.S. at 486-87, 493-94; *id.* at 497-98 (Scalia, J., concurring in part and dissenting in part); *Malley* v. *Briggs*, 475 U.S. 335, 339-40 (1986); *Tower* v. *Glover*, 467 U.S. 914, 920-21 (1984).

Under this approach, the vast majority of government officials are entitled to qualified immunity. See *Burns*,

500 U.S. at 498 n.1 (Scalia, J., concurring in part and dissenting in part) (observing that "the common law extended qualified immunity to public officials quite liberally" while "[a]bsolute immunity * * * was exceedingly rare"). While such immunity takes account of the responsibilities that many government officers shoulder and provides them significant substantive and procedural protections, it remains fundamentally consistent with constitutional first principles by ensuring that officers are accountable to the Constitution and to those whom they injure through abuse of authority; preserving the role of the courts in articulating what the law requires, see *Marbury*, 5 U.S. at 177; and, in cases where violations of clearly established constitutional law are alleged, respecting the power of a civil jury to render its verdict on the officer's conduct.

Absolute immunity, in contrast, removes official accountability for even the most flagrant abuses of civil rights. A rule that provides absolute immunity to *prosecutors* – a huge class of officials with sweeping powers over the lives of ordinary citizens – works a direct blow to the system of official accountability established in the Constitution and reinforced in Section 1983.

II. *IMBLER'S* CONSTRUCTION OF SECTION 1983 IS ERRONEOUS AND SHOULD BE OVERRULED

A. *Imbler* Was Wrongly Decided

In *Tenney* v. *Brandhove*, 341 U.S. 367 (1951), this Court first announced an approach for determining claims of immunity by those sued under Section 1983. Rejecting the argument that the text of the statute left no room for legislative immunity, the Court declined to read the statute's encompassing "general language" as abrogating

a doctrine it found firmly "grounded in history and reason," *id.* at 376. As the Court would later explain, the *Tenney* decision rested on a judgment as to "likely" legislative intent: "members of the 42nd Congress were familiar with common-law principles, including defenses previously recognized in ordinary tort litigation, and * * * they likely intended these common-law principles to obtain." *City of Newport* v. *Fact Concerts, Inc.*, 453 U.S. 247, 258 (1981).

In subsequent Section 1983 cases, the Court has made clear (1) that absolute immunity is a disfavored exception, not the rule, see *Burns*, 500 U.S. at 486-487; (2) that the focal point of the historical inquiry is the common law at "the time of [§ 1983's] enactment," see *Kalina* v. *Fletcher*, 522 U.S. at 123; and (3) that an 1871 common law pedigree is a "*necessary*" condition for absolute immunity under § 1983, not a *"sufficient"* one, *Burns*, 500 U.S. at 497 (Scalia, J., concurring in part and dissenting in part) (emphasis original). "If an official was accorded [absolute] immunity from tort actions at common law when the Civil Rights Act was enacted in 1871, the Court next considers whether § 1983's history or purposes nonetheless counsel against recognizing the same immunity in § 1983 actions," *Tower* v. *Glover*, 467 U.S. 914, 920 (1984). Accord *Malley* v. *Briggs*, 475 U.S. 335, 340 (1985).

Under these principles, the error of *Imbler* is manifest. First, although the *Imbler* Court expressly recognized that considerations of policy alone could not support a judicially-promulgated rule of absolute prosecutorial immunity – and that any such protection would have to be "predicated upon a considered inquiry into the immunity historically accorded the relevant official at common law," 424 U.S. at 421, the Court's decision failed to answer – or even ask – "the first and

crucial question," *Pulliam* v. *Allen*, 466 U.S. 522, 529 (1984), whether, *at the time Section 1983 was enacted*, "the common law recognized [the absolute immunity asserted]," *id.*

Rather, while the *Imbler* Court described absolute prosecutorial immunity as the "well-settled common-law rule," *id.* at 424, its own account identified *Griffith* v. *Slinkard*, 146 Ind. 117 (1896), a decision rendered a quarter century after Section 1983's enactment, as the "first American case" to embrace the rule, *id.* at 421, and the Court's roster of supporting authorities, see *id.* at 424 n.21, began with *Anderson* v. *Rohrer*, 3 F. Supp. 367 (S.D. Fla. 1933)), decided nearly four decades after that.

If the *Imbler* Court had sought an answer to this legally dispositive question, it would have found that "[t]here was, of course, no such thing as absolute prosecutorial immunity when § 1983 was enacted," *Kalina*, 522 U.S. at 132 (Scalia, J., concurring); see also *Burns*, 500 U.S. at 505 (Scalia, J.) (*Imbler* "relied * * * upon a common-law tradition * * * that * * * was not even a logical extrapolation from then-established immunities"). Many nineteenth century cases allowed malicious prosecution suits to proceed against privately-retained prosecutors who then handled most criminal cases, see *Warfield* v. *Campbell*, 35 Ala. 349, 350 (1859); *Burnap* v. *Marsh*, 13 Ill. 535, 538 (1852) (explaining that exempting prosecuting attorneys from liability would "authoriz[e] those who are the most capable of mischief to commit the grossest wrong"); *Wood* v. *Weir*, 44 Ky. 544, 547 (1845) (because attorneys have great power with courts, "for good or evil, * * * holding [them] to a strict accountability will have the effect to exalt and dignify the profession by purging it of ignorant, meretricious and reckless members"), and *Parker v. Huntington*, 68 Mass.

124 (1854), indicated that a plaintiff could maintain a malicious prosecution action against a District Attorney who had elicited and used false testimony in a criminal prosecution.[3]

A treatise on malicious prosecution published two decades *after* Section 1983's enactment gave no indication that prosecutors (whether public or private) were immune from such suits and stated that "quasi-judicial officers" – those situated "midway between the judicial and ministerial ones," and whose duties entailed " looking into the facts and acting upon them" – were liable if they acted "dishonestly or maliciously." see M. NEWELL, MALICIOUS PROSECUTION 166 (1892), and numerous courts continued to hold allow public prosecutors to be sued for that tort well after 1871. See *Arnold* v. *Hubble*, 38 S.W. 1041 (1897); *Skeffington* v. *Eylward*, 97 Minn. 244, 248 (1906); *Leong Yau* v. *Carden*, 23 Haw. 362, 369 (1916); see also *Dean* v. *Kochendorfer*, 237 N.Y. 384 (1924).

Furthermore, as Justice Scalia explained in *Burns*, of the three possibly *analogous* immunities in place in 1871,

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[3]Although public prosecutors were less common in the nineteenth century, they were not entirely unknown in America. See *Burns*, 500 U.S. at 493. Moreover, to conclude that Congress intended – or would have intended – public officials to have greater immunity than private actors ignores the text and purposes of Section 1983. See Achtenberg, 86 NW. U. L. REV. at 524 ("Unlike common law tort doctrine, § 1983 was specifically aimed at public officials. Immunities designed to minimize the extent to which common-law principles unintentionally impinged on official prerogatives would be peculiarly ill-suited to a statute * * * primarily intended to prevent the abuse of those prerogatives"). And as explained *infra*, the historical evidence of the 42nd Congress's specific concern about *prosecutorial* wrongdoing makes that suggestion especially implausible.

the closest one, for government servants performing discretionary "quasi-judicial acts," was *not* absolute and could be overcome by proving malice. See 500 U.S. at 500 ("I do not doubt that prosecutorial functions, had they existed in their modern form in 1871, would have been considered quasi-judicial" and citing contemporaneous cases applying that doctrine).[4]

Nor did *Imbler* venture an answer to the *second* critical question: whether "*1983's history or purposes* * * * counsel against recognizing the [common law] immunity," *Tower*, 467 U.S. at 920 (emphasis added). See *Gomez* v. *Toledo*, 446 U.S. 635, 639 (1980) (immunities must be "*both* 'well established at common law' *and* 'compatible with the purposes of the Civil Rights Act'") (quoting *Owen*, 445 U.S. at 638) (emphasis added). Although the *Imbler* Court canvassed various policies supporting its absolute immunity holding, it made no attempt to ascertain the general purposes or specific intentions of the 42nd Congress.

This was an extraordinarily consequential omission. The legislative history of the Act makes clear the primacy of providing a remedy for violations of federal rights. See David Achtenberg, *Immunity Under 42 U.S.C. § 1983: Interpretive Approach and the Search for the Legislative Will*, 86 NW. U. L. REV. 497, 539 (1992) ("For the 42nd Congress * * * protection of individual rights was more

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[4]Justice Scalia explained that prosecutors would not have been entitled to absolute judicial immunity and that though the common law also accorded complaining witnesses absolute immunity – that was "*only* against suits for defamation" – they could "still be sued for malicious prosecution." And as respondent explains, even nineteenth century absolute *judicial* immunity did not extend to *administrative* acts performed by a judge. See Br. 42-43; see also *Forrester* v. *White*, 484 U.S. 219, 229 (1988); *Ex parte Virginia*, 100 U.S. 339, 348 (1880).

than one desirable goal among many. It was a hierarchically superior purpose – a goal that government had a duty to achieve as completely as possible before other goals could be considered"). Thus, Representative Dawes, a member of the select committee that drafted the bill, explained, "If you can show me that there is in the arsenal of the Constitution any weapon of defense that the American citizen can take with him to face any unlawful attempt to trench upon the rights secured to him by it, I will use it," Cong. Globe, 42nd Cong., 1st Sess., at 476, Senator Edmunds, the manager of the bill in the Senate, stated he was willing to enact "every measure of constitutional legislation which will have a tendency to preserve life and liberty and uphold order." *Id.* at 691. Indeed, these expressions of single-mindedness were not mere rhetoric: the civil action codified as Section 1983 was one avowedly "mild" component, *id.* at 482 of an act other provisions of which "gave the President the unprecedented authority to use federal troops to protect individual rights when the States failed or were unable to do so, and * * * authorized the President to suspend the writ of habeas corpus to insure the prosecution of conspirators who violated individual rights." 86 NW. U. L. REV. at 547.

The drafters of Section 1983 meant the new statutory remedy to be implemented in accordance with its broad terms. Representative Shellabarger, the author and manager of the bill in the House, posited an approach to construing the statute starkly at odds with judicially-crafted exemptions:

> This act is remedial, and in aid of the preservation of human liberty and human rights. All statutes and constitutional provisions authorizing such statutes are liberally and beneficently construed. It would be most

> strange and, in civilized law, monstrous were this not the rule of interpretation. As has been again and again decided by your own Supreme Court of the United States, * * * the largest latitude consistent with the words employed is uniformly given in construing such statutes and constitutional provisions as are meant to protect and defend and give remedies for their wrongs to all the people.

Cong. Globe, 42nd Cong., 1st Sess., App. 68 (1871).[5]

Not only did Congress intend Section 1983 to be construed in accord with its broad terms, but its authors were concerned about the problem of wrongful prosecutions. Abuse of prosecutorial power was no mere abstraction for the legislators who enacted Section 1983, but rather a protracted "crisis that provoked vigorous debate and decisive legislative action." Achtenberg, *With Malice Toward Some: United States* v. *Kirby, Malicious Prosecution, and the Fourteenth Amendment*, 26 RUTGERS L.J. 273, 342 (1995). As members of the 42nd Congress were keenly aware, Confederate sympathizers in Kentucky, Virginia, Texas, and other States were able to take over the machinery of state and local government after the Civil War, initiating thousands of civil suits and criminal prosecutions against African Americans and Union loyalists, for "offenses" such as violating the slave code, capturing confederate soldiers during the war, and

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[5]As Professor Achtenberg explains, the notion that the 42nd Congress intended to vest this Court with broad discretion to dispense absolute immunities is historically inapt. Not only was anger at the Court's *Dred Scott* decision still alive among those who enacted Section 1983, but the legislators debated and enacted a series of extraordinary measures in the late 1860s aimed at curbing the Supreme Court's power to rule on the constitutionality of civil rights legislation See 86 NW U. L. REV. at 532.

acting "disloyally" by challenging in court the Virginia law prohibiting African Americans from testifying. *Id.* at 299, 340-41. See Report of the Joint Committee on Reconstruction, 39th Cong., 1st Sess., at xvii-xviii (1866) (reporting that "prosecutions have been instituted in State courts against Union officers for acts done in the line of official duty, and similar prosecutions are threatened elsewhere as soon as the United States troops are removed").

Thus, *Imbler* erred in creating absolute prosecutorial immunity in the face of evidence that prosecutors were liable for malicious prosecution at the time Section 1983 was enacted and that the drafters of Section 1983 fully expected the statute's remedy to protect against such misconduct.

B. *Imbler* Should Be Overruled

This Court's subsequent prosecutorial immunity decisions have sought to pare back and rationalize *Imbler*. But they have never revisited its central, erroneous holding: that even prosecutors who knowingly deprive a citizen of his clearly established constitutional rights need not answer to him in a § 1983 action. Indeed, even Court opinions that have acknowledged *Imbler*'s analytical shortcomings have suggested, without further elaboration, that "reasons of *stare decisis*" support adhering to *Imbler*'s absolute immunity rule, *Burns*, 500 U.S. at 505 (Scalia, J., concurring in part and dissenting in part); accord *Kalina*, 522 U.S. at 135 (Scalia, J., concurring). We respectfully disagree.

As in *Monell*, it is "'beyond doubt'" that *Imbler* "'misapprehended'" the meaning and history of section 1983, and that overruling the decision is "clearly proper." 436 U.S. at 700 (quoting *Monroe*, 365 U.S. at 192 (Harlan,

J., concurring)); see *id.* at 705 (Powell, J., concurring) (finding overruling *Monroe*'s conclusion concerning municipal liability warranted, based on "[t]he oddness of [its] result, and the weakness of the historical evidence relied on by the Court in support of it").

Moreover, as discussed above, because absolute immunities run counter to the principles of accountability running throughout the original and amended Constitution, it is especially important that the Court cease applying absolute prosecutorial immunity in cases where constitutional rights are flagrantly violated – and where Congress has never provided for it.

1. This Court's Subsequent Section 1983 Cases Are Inconsistent With *Imbler* And Have Eroded The Justifications For *Imbler*'s Rule Of Absolute Immunity.

A series of developments in this Court's Section 1983 jurisprudence have "weakened the decision's conceptual underpinnings," *Patterson*, 491 U.S. at 173.

First and most important, *Imbler*'s central premise, arguably its holding, that affording prosecutors qualified, rather than absolute, immunity would provide inadequate protection – has been overtaken by developments in this Court's later case law. The *Imbler* Court identified what it determined to be the important "difference between the absolute and the qualified immunities": that "[a]n absolute immunity defeats a suit at the outset, so long as the official's actions were within the scope of the immunity," whereas the "fate of an official with qualified immunity depends upon the circumstances and motivations of his actions, as established by the evidence at trial." 424 U.S. at 419 n. 13. This distinction, however, no longer holds true.

Not only has the determination *Imbler* treated as straightforward – whether "the official's actions were within the scope of the immunity," increasingly vexed the federal courts, see *infra* – but still more important, the Court has, since *Imbler*, "completely reformulated qualified immunity [by] replacing the common-law subjective standard with an objective standard that allows liability only where the official violates 'clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Burns*, 500 U.S. at 494 n.8 (quoting *Harlow* v. *Fitzgerald*, 457 U.S. 800, 818 (1982)). As the Court explained, "[t]his change was 'specifically designed to avoid excessive disruption of government and permit the resolution of many insubstantial claims on summary judgment, and we believe it sufficiently serves this goal.'" 500 U.S. at 494 n.8 (quoting *Malley*, 475 U.S. at 341, and *Anderson* v. *Creighton*, 483 U.S. 635, 645 (1987)).

In addition, since *Imbler*, government officials have been afforded the right to immediately appeal denials of qualified immunity, *Mitchell* v. *Forsyth*, 472 U.S. 511 (1985); see also *Anderson*, 483 U.S. at 646 n.6 ("qualified immunity questions should be resolved at the earliest possible stage of a litigation" and that initial "discovery should be tailored specifically to the question of * * * qualified immunity"). Accordingly, *Imbler*'s finding of absolute immunity where it was not legislatively authorized can no longer be justified based on the inadequacy of qualified immunity.

Finally, this Court's intervening decision in *Heck* v. *Humphrey*, 512 U.S. 477 (1994), substantially dampens *Imbler*'s concern that prosecutors would be inundated with vindictive suits by "resent[ful]" defendants. See 424 U.S. at 425. Citing the necessity of harmonizing §

1983 with the federalism and comity considerations incorporated in the federal habeas corpus statute, *Heck* held that the Section 1983 cause of action is unavailable to challenge the constitutionality of actions that resulted in a criminal conviction, unless those proceedings had terminated "favorabl[y]" to the prospective plaintiff. 512 U.S. at 484. Although *Heck* is no bar to claims by Goldstein and other exonerees, the class of litigants who will be able to overcome that limitation *and* defeat the *Harlow* qualified immunity defense is a small subset of those who might feel "resentment" against prosecutors.

2. The *Imbler* Regime Has Proved Unworkable And Arbitrary

The *Imbler* holding has become "a positive detriment to coherence and consistency in the law." *Patterson* v. *McLean Credit Union*, 491 U.S. 164, 172-73 (1989). *Imbler* and its progeny have produced confusion within the domain in which they operate directly – Section 1983 suits against prosecutors. The "line" between prosecutorial conduct that is accorded absolute immunity and that subject to qualified immunity shifts from Circuit to Circuit, and the courts of appeals are sharply divided on a number of large issues, including: whether a prosecutor is entitled to absolute immunity for fabricating evidence that is then used in a judicial proceeding, whether probable cause is *always* required before absolute immunity will attach; how to determine whether *Buckley*'s probable cause cut-off has been met; and how to determine whether a prosecutor is acting as an investigator or advocate when misconduct followed establishment of probable cause. See generally Margaret Z. Johns, *Reconsidering Absolute Prosecutorial Immunity*, 2005 BYU L. REV. at 56-57, 89-106 (detailing these conflicts). Indeed, "[w]hile the lower courts have

been vexed with confusion about absolute prosecutorial immunity for many years, since 2003 this uncertainty has become increasingly problematic." *Id.* at 90.

The appellate courts' various resolutions of these immunity questions are not only unpredictable – itself a serious vice in a regime where legal certainty is of central import – but the determination of the "level of immunity" question requires the kind of complex, fact-intensive litigation that is the opposite of the speedy, conclusive dismissal right that the *Imbler* Court assumed it was conferring. See Johns, 2005 BYU L. REV. at 58. See *Swift & Co.* v. *Wickham*, 382 U.S. 111, 124 (1965) (explaining that a rule intended "to expedite important litigation * * * should not be interpreted in such a way that litigation * * * is delayed while [collateral issue] is litigated," and therefore overruling *Kesler* v. *Department of Public Safety*, 369 U.S. 153 (1962)).

This Court's prosecutorial immunity decisions echo the discord among the lower courts. Having failed to focus on congressional intent, the Court has struggled, and failed, to establish clear, administrable rules on prosecutorial liability. Thus, it is hardly surprising that separate opinions in these cases highlight the arbitrariness and complexity of the current doctrine. For example, in *Buckley*, Justice Kennedy, while acknowledging that policing the line between advocatory and investigatory functions often requires "difficult and subtle distinctions," 509 U.S. at 290 (opinion concurring in part and dissenting in part), maintained that the Court's decision would "create[] more problems than it has solved," *id.*, and that "the classic case for the invocation of absolute immunity [would] fall[] on the unprotected side of the Court's new dividing line," *id.* at 287. See also *Kalina*, 522 U.S. at 132 (Scalia, J., concurring) (observing

that "[a] conscientious prosecutor reading our cases" would find that the Court's approach to prosecutorial immunity questions has produced results that were "exactly opposite" of "the common law as it existed in 1871, when § 1983 was enacted").[6]

This arbitrariness and unpredictability erodes the virtue most ardently claimed for the *Imbler* rule: that it could remove the cloud of potential civil liability that might otherwise hang over the head of a well-intended prosecutor.

3. *Imbler*'s Factual Premises Have Been Shown To Be Erroneous

Experience since *Imbler* has also cast serious doubt on key factual premises of that decision: that sanctions such as professional discipline and criminal punishment would provide a meaningful alternative deterrent to unconstitutional action and that the constitutional violations of prosecutors are more likely to be detected and remedied than those committed by other government officials. See 424 U.S. at 426. Cf. *Mitchell*, 472 U.S. at 522-23 (observing that "officials who are entitled to absolute immunity from liability for damages are subject to other checks that help to prevent abuses of authority from going unredressed * * *, and the judicial process is largely self-correcting: procedural rules, appeals, and the

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[6]As this case also well illustrates, the *procedural* regime to which *Imbler* and progeny have given rise is wasteful and undesirable. Because denials of absolute immunity are immediately appealable, *Mitchell*, 472 U.S. at 525 – and because a defendant does not forfeit the right to assert a qualified immunity defense by limiting his appeal to the absolute immunity issue, "preliminary" proceedings can consume years. See *Buckley*, 20 F.3d 789, 793 (7th Cir. 1994) (noting that case was "five years old, [but] defendants have yet to answer the complaint").

possibility of collateral challenges obviate the need for damages actions to prevent unjust results").

The evidence concerning alternative sanctions leave little hope that they might deter a prosecutor otherwise disposed to abuse his authority. The *Imbler* Court did not cite any case in which 18 U.S.C. § 242 charges had been filed against a prosecutor, and Professor Johns, in an article published in 2005, could find only one such case since the statute's 1866 enactment. 2005 BYU L. Rev. at 71 & n.130 (citing *Brophy* v. *Comm. on Prof'l Standards*, 442 N.Y.S.2d 818 (N.Y. App. Div. 1981), in which a state board cited the conviction as a *mitigating* factor in disciplinary proceedings).

Attorney disciplinary proceedings against prosecutors are likewise surpassingly rare. One study found that between 1886 and 2000, disciplinary proceedings against prosecutors averaged less than one per year *nationally*. See Johns, 2005 BYU L. REV. at 70. See M. Zapler, "Prosecutors, Defense Rarely Disciplined," *San Jose Mercury News* (Feb. 12, 2006) (finding, after investigating 1500 state disciplinary actions against California attorneys, that only *one* involved a prosecutor – who was sanctioned for covertly assisting a person under investigation and received a brief suspension). Even the relatively mild dignitary sanction of naming a transgressing prosecutor in an appellate decision is very rare, Johns, 2005 BYU L. REV. at 109. A celebrated exception to that general rule, the California Supreme Court's decision in *People* v. *Hill*, 952 P.2d 673 (1997), which identified prosecutor Rosalie Morton by name more than 120 times, documenting a "mountain of deceit and unethical behavior," *id.* at 698, in obtaining a murder conviction, apparently did not result in so much as a reprimand. See Zapler (noting that though the case was

"cited in textbooks and court filings as the epitome of prosecutorial misconduct in California[,] the bar * * * took no action").

Moreover, recent studies of cases of individuals wrongfully convicted – including many definitively exculpated through DNA testing – have confirmed the centrality of abuses of prosecutorial power in many of the most severe injustices and highlight the extent to which *Imbler*'s confidence in the self-correcting character of the criminal justice system was misplaced. See, *e.g.*, Brandon L. Garrett, *Judging Innocence*, 108 COLUM. L. REV. 55, 127 (2008).

These findings underscore two facts that the *Imbler* decision largely ignored (though they were well known to the nineteenth-century lawyers who enacted Section 1983): that much of the most egregious and extreme prosecutorial misconduct is likely to evade detection and correction, cf. *Imbler*, 424 U.S. at 443 (White, J., concurring), and the injuries these extreme abuses of power cause – up to and including death sentences for innocent persons go far beyond those of actors who remain accountable under Section 1983 for violations of clearly established law. See, *e.g.*, *Wood* v. *Strickland*, 420 U.S. 308 (1975) (school board members); *Wilson* v. *Layne*, 526 U.S. 603 (1999) (deputy marshals)

4. No Legitimate Reliance Interests Support Preserving *Imbler*'s Erroneous Rule Of Absolute Immunity

No litigant can justifiably claim a *bona fide* expectation that the *Imbler* rule would remain the law. As the Court explained in *Monell*, "[t]his is not an area of commercial law in which, presumably, individuals may have arranged their affairs in reliance on the expected stability of decision." 436 U.S. at 700 (quoting *Monroe*,

365 U.S. at 221-222 (Frankfurter, J., dissenting in part)); *State Oil Co.* v. *Khan*, 522 U.S. 3, 20-21 (1997) (observing that "*stare decisis* concerns are at their acme in cases involving property and contract rights") (citing *Payne* v. *Tennessee*, 501 U.S. 808, 828 (1991)).

The only class of cases directly affected by overruling *Imbler* are those involving defendants who violate clearly established constitutional rights: abolishing absolute immunity would still leave "all but the plainly incompetent or those who knowingly violate the [Constitution]," *Malley*, 475 U.S. at 341, immune from suit. Those who are sworn to uphold the Constitution can have no legitimate reliance interest in remaining free to flagrantly violate constitutional rights with impunity. See U.S. Const. art. VI ("The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution").

III. SECTION 1983'S INTENDED ROLE AS BULWARK FOR CONSTITUTIONAL RIGHTS LESSENS ANY *STARE DECISIS* DEFERENCE TO *IMBLER*

While the considerations on which this Court ordinarily relies in considering whether to overrule one of its precedents all point to overruling *Imbler* here, additional considerations, specific to Section 1983 and its role as a bulwark for constitutional rights, provide further reasons for doing so.

Section 1983 is no ordinary statute: it was enacted to provide a federal remedy for violations of hard-won civil rights, by a Congress unique in history for its

commitment to exercising the full extent of its constitutional authority to make individual rights judicially enforceable. As explained above, granting absolute immunity from suit for constitutional violations is at odds with core constitutional values and a longstanding tradition of using civil damages actions to check abuses of power. A rule of law that relieves those exercising governmental authority from accountability to those whose constitutional rights they deprive is no small matter. But it is all the more grave to read such a rule into Section 1983, a provision whose sole concern is the unconstitutional behavior of those acting cloaked with government authority and whose central purpose was to provide a civil remedy to those injured – and do so for a class of officials recognized to have "more control over life, liberty, and reputation than any other person[s] in America." Robert H. Jackson, *The Federal Prosecutor*, 24 J. AM. JUD. SOC'Y 18 (1940). *Imbler*'s rule of absolute immunity is an indefensible judicial revision of the nation's pivotal civil rights statute, and is anathema to the system of official accountability to citizens established by the Constitution.

CONCLUSION

The judgment of the court of appeals should be affirmed, and in doing so the Court should overrule *Imbler*.

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AMICUS CURIAE BRIEF

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No. 07-854

In the Supreme Court of the United States

JOHN VAN DE KAMP and CURT LIVESAY,

Petitioners,

v.

THOMAS LEE GOLDSTEIN,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF AMICUS CURIAE COOK COUNTY IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

1. Where absolute immunity shields an individual prosecutor's decisions regarding the disclosure of informant information in compliance with *Brady v. Maryland*, 373 U.S. 83 (1963) and *Giglio v. United States*, 405 U.S. 150 (1972) made in the course of preparing the initiation of judicial proceedings or trial in any individual prosecution, may a plaintiff circumvent that immunity by suing one or more supervising prosecutors for purportedly improperly training, supervising, or setting policy with regard to the disclosure of such informant information for all cases prosecuted by his or her agency?

2. Are the decisions of a supervising prosecutor as chief advocate in directing policy concerning and overseeing training and supervision of individual prosecutors' compliance with *Brady v. Maryland*, 373 U.S. 83 (1963) and *Giglio v. United States*, 405 U.S. 150 (1972) in the course of preparing for the initiation of judicial proceedings or trial for all cases prosecuted by his or her agency, actions which are "intimately associated with the judicial phase of the criminal process" and hence shielded from liability under *Imbler v. Pachtman*, 424 U.S. 409, 430 (1976)?

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INTEREST OF AMICUS

Amicus is the County of Cook, Illinois, the second largest county in the United States. The State's Attorney of Cook County is the chief legal officer for Cook County and is constitutionally and statutorily charged with representing the County in all civil litigation. *County of Cook ex rel. Rifkin v. Bear Stearns & Co.*, 215 Ill. 2d 466, 831 N.E.2d 563 (2005). Cook County is responsible for paying settlements and judgments in §1983 and common law tort actions against county officials. *Carver v. Sheriff of La Salle County*, 203 Ill. 2d 497, 787 N.E.2d 127 (2003). The federal courts have expanded this principle from *Carver* and have held that Illinois counties are liable for judgments entered against State officials whose offices are funded by counties. *Robinson v. Sappington*, 351 F.3d 317, 339 (7th Cir. 2003) *citing Pucinski v. County of Cook*, 192 Ill. 2d 540, 737 N.E.2d 225 (2000).

In Illinois, State's Attorneys and their Assistant State's Attorneys are State officials. *Hoyne v. Danisch*, 264 Ill. 467, 470-72, 106 N.E. 341, 342, 343 (1914); *Ingemunson v. Hedges*, 133 Ill. 2d 364, 369, 549 N.E.2d 1269, 1271, 1272 (1990). The outcome of the litigation before this Court will impact the civil liability of assistant state's attorneys who are defendants in §1983 claims regarding an alleged failure to train, failure to supervise, or failure to develop an office-wide policy regarding a constitutional obligation. Hence, Cook County has an interest in the resolution of this litigation because it bears financial responsibility for paying settlements and judgments in §1983 actions against Assistant State's Attorneys.

As the legal representative of a unit of state government, Supreme Court Rule 37 allows *Amicus* to file a supporting brief without permission of the parties. Therefore, Cook County, Illinois respectfully submits this brief as *Amicus Curiae* in support of Petitioners in accordance with Supreme Court Rule 37.

STATEMENT OF THE CASE

Amicus adopts the Statement of the Case presented by Petitioners John Van de Kamp and Curt Livesay.

SUMMARY OF ARGUMENT

Certain courts, such as the Ninth Circuit in the case below, have construed the exceptions to absolute prosecutorial immunity in an unjustifiably broad fashion to the point where such exceptions swallow the rule. This Court did not adopt a functional approach to prosecutorial immunity for the purpose of wiping the concept out of existence but rather to clarify its scope. *See, e.g., Kalina v. Fletcher*, 522 U.S. 118, 125 (1997). This approach "rests on functional categories, not on the status of the defendant." *Briscoe v. LaHue*, 460 U.S. 325, 342 (1983). Consequently, in cases applying prosecutorial immunity, this Court expresses "its conclusion in terms of whether the particular 'function' at issue would have been entitled to immunity at common law." *Kalina*, 522 U.S. at 134 (Scalia, J., concurring).

This Court has observed that a prosecutor's responsibility occasionally "cast[s] him in the role of an administrator or investigative officer rather than that of

advocate." *Imbler v. Pachtman*, 424 U.S. 409, 430-431 (1976). *Imbler* declined to draw a line between these functions, as it was not necessary to do so to decide that case. *Id.* at 431, n. 33. In *Buckley v. Fitzsimmons*, 509 U.S. 259 (1993), this Court followed *Imbler* and found that administrative and investigative functions, unlike prosecutorial functions, did not fall within the scope of conduct subject to absolute prosecutorial immunity. *Buckley*, 509 U.S. at 275-276. *Accord Hartman v. Moore*, 547 U.S. 250, 262, n. 8 (2006). Unfortunately, as one lower court observed, "there is no bright line between advocacy and investigation." *Mink v. Suthers*, 482 F.3d 1244, 1261 (10th Cir. 2007). The Ninth Circuit's recent decision in *Goldstein v. City of Long Beach*, 481 F.3d 1170 (9th Cir. 2007) shows that there is likewise no bright line between advocacy and administration.

In *Goldstein*, the respondent Thomas Lee Goldstein ("Respondent" or "Goldstein") was convicted of murder. Goldstein alleged that the prosecutors in his criminal case violated *Brady v. Maryland*, 373 U.S. 83 (1963) and *Giglio v. United States*, 405 U.S. 150 (1972) by not disclosing that Edward Fink, the witness who testified against Goldstein, was a jailhouse informant. Subsequent to a successful *habeas corpus* petition, Goldstein filed §1983 claims against several defendants, including Van De Kamp, the Los Angeles district attorney, and Livesay, his chief deputy. Goldstein did not sue the attorneys who prosecuted his criminal case but rather their supervisors, Van De Kamp and Livesay, on the theory that they violated Goldstein's constitutional rights by purposefully, or with deliberate indifference, failed to create a system that

would satisfy prosecutors' obligations under *Brady* and *Giglio*.

Under *Brady*, the prosecution is required to produce any information that is or may be exculpatory to the defense. In addition, under *Giglio*, the prosecution must produce any information it possesses that impeaches or may lead to the impeachment of a government witness. No violation of *Brady* occurs unless the government's nondisclosure infringes the defendant's fair trial right. *United States v. Starusko*, 729 F.2d 256, 262 (3rd Cir. 1984); *United States v. Maniktala*, 934 F.2d 25, 28 (2nd Cir. 1991).

Even though *Brady* confers a trial right, Goldstein did not sue the attorneys who actually prosecuted his criminal case. Goldstein presumably did not do so because those attorneys are immune from suit under this Court's decision in *Imbler*. In an attempt to sidestep the holding in *Imbler* and the doctrine of absolute prosecutorial immunity, Respondent instead sued the prosecuting attorneys' supervisors. This litigation stratagem should not have succeeded but it did.

Goldstein's §1983 claims against petitioners Van De Kamp and Livesay ("Petitioners") should have been dismissed for three reasons. First, §1983 does not provide for *respondeat superior* liability and Respondent's claims against Van De Kamp and Livesay were based upon their conduct as supervisors. *See Whitman v. Nesic*, 368 F.3d 931, 936, n. 2 (7th Cir. 2004).

Second, under California law, a lawsuit against the district attorney based upon the exercise of his prosecutorial duties is really a lawsuit against the State. *Pitts*

v. County of Kern, 17 Cal. 4th 340, 362, 949 P.2d 920, 934-35 (1998). The Eleventh Amendment bars official capacity claims against prosecutors where their office is a State office. *See, e.g., Hernandez v. Joliet Police Dep't*, 197 F.3d 256 (7th Cir. 1999). To the extent that Goldstein attempted to bring his §1983 claims against Van De Kamp and Livesay in their official capacity, the Eleventh Amendment would bar such claims. *Id.*

Third, and cardinally, the alleged conduct of Van De Kamp and Livesay was not administrative but prosecutorial in nature. "Prosecution is often a 'joint enterprise'" and prosecutors function as a team. *White v. City of Chicago*, 369 Ill. App. 3d 765, 778, 861 N.E.2d 1083, 1094 (1st Dist. 2006). In obtaining, reviewing and evaluating evidence, prosecutors function as an advocate and as officers of the court. *See, e.g., Imbler*, 424 U.S. at 431, n. 33; *Buckley*, 509 U.S. at 276, n. 7. Courts have found that absolute immunity attaches to "administrative or investigative activities when these functions are necessary so that a prosecutor may fulfill his function as an officer of the court." *Mink*, 482 F.3d at 1261; *Pfeiffer v. Hartford Fire Ins. Co.*, 929 F.2d 1484, 1490 (10th Cir. 1991).

The right to discovery of exculpatory material in *Brady* is a trial right and prosecutors comply with this Court's mandate in *Brady* precisely because they function as advocates and officers of the court. Consequently, the alleged conduct of Van De Kamp and Livesay regarding policies and training of deputy district attorneys regarding the obligation to disclose exculpatory information under *Brady* and *Giglio* was intimately related to the judicial phase of prosecution. Under *Imbler*, petitioners Van De Kamp and Livesay should have been absolutely immune from suit.

Importantly, the denial or diminution of absolute prosecutorial immunity would, on the other side of the equation, have the unprecedented effect of a concomitant, unwarranted expansion of Respondent's Due Process right to a fair trial to the outer limits of the prophylactic framework that this Court suggested in *Giglio*. Such an expansion of this Due Process right into the realm of the executive branch (*i.e.*, the policies, training and supervision within a local prosecutor's office) raises serious concerns with respect to federalism and separation of powers.

Absolute quasi-judicial prosecutorial immunity should not be a hollow promise. Consequently, this Court should reverse the decision of the Ninth Circuit in *Goldstein* and hold that policies regarding the evaluation of evidence, the interviewing of witnesses, the preparation and prosecution of criminal cases and the training of prosecutors pertain not to an administrative function but rather to a prosecutorial function.

For the reasons set forth below, the judgment of the United States Court of Appeals for the Ninth Circuit should be reversed with directions to reverse the order denying the motion to dismiss of petitioners Van de Kamp and Livesay and to enter an order dismissing the action.

ARGUMENT

In his separate opinion in *Buckley*, Justice Kennedy (joined by Chief Justice Rehnquist, Justice White and Justice Souter), observed that the "concern that prosecutors can disguise their investigative and administrative actions as early forms of advocacy seems to be un-

founded." *Buckley*, 509 U.S. at 290 (Kennedy, J., concurring in part and dissenting in part). Justice Kennedy predicted that "[i]n recognizing a distinction between advocacy and investigation, the functional approach requires the drawing of difficult and subtle distinctions. . . *But the rule the Court adopts has created more problems than it has solved.*" *Id.* (emphasis added). *Goldstein* proves Justice Kennedy to be prescient. Because the alleged conduct of Petitioners relates to a prosecutorial function, this Court should reverse the decision of the Ninth Circuit.

In support of this position, *Amicus* will address the following issues: (1) the historical basis for judicial immunity and absolute quasi-judicial prosecutorial immunity, (2) the impact that the Ninth Circuit's opinion in *Goldstein* would have on prosecutors in California and other states, such as Illinois, where prosecutors are State officials, (3) the current state of absolute prosecutorial immunity and how the approach of the Ninth Circuit in *Goldstein* would eviscerate both the scope and benefits of this immunity and (4) how the diminution of immunity endorsed in *Goldstein* would lead to an unintended and unwarranted expansion of *Brady* well beyond the trial right that the Due Process Clause currently confers.

A. At Common Law, Prosecutors Are Entitled To Absolute, Quasi-Judicial Prosecutorial Immunity.

State courts and federal courts have consistently recognized that at common law, judges and prosecutors are absolutely immune from suit based upon the performance of their judicial and quasi-judicial functions, respectively. This doctrine evolved so that judges and prosecutors could perform their official duties without fear of intimidation through collateral civil litigation and so that alleged errors in criminal prosecutions would be corrected through appeal and not through collateral litigation. *Imbler*, 424 U.S. at 424-428.

The common law has long recognized judicial immunity, as well as the quasi-judicial prosecutorial immunity derived from it. In Illinois, for example, the common law of England has been recognized and enhanced for over 180 years because that law was "in force in the Illinois Territory after the cession by Great Britain, such having been the law of Virginia prior to the cession by that State." *Levalle v. Strobel*, 89 Ill. 370, 380 (1878). For almost two centuries, Illinois courts have applied the prevailing principle "that the common law remains the law of Illinois unless it is expressly revoked by statute." *City of Chicago v. Nielsen*, 38 Ill. App. 3d 941, 946, 349 N.E.2d 532 (1st Dist. 1976).

Judicial immunity is deeply rooted in the common law. *Bradley v. Fisher*, 13 Wall. (80 U.S.) 335, 347 (1871). This Court has recognized that "judicial immunity apparently originated, in medieval times, as a device for discouraging collateral attacks and thereby helping to

establish appellate procedures as the standard system for correcting judicial error." *Forrester v. White*, 484 U.S. 219, 225, 108 S. Ct. 538, 543 (1988) *citing* Block, *Stump v. Sparkman and the History of Judicial Immunity*, 1980 Duke L. J. 879. A judge acting in his judicial capacity is absolutely immune from such suits, unless the judge acts clearly without any colorable claim of jurisdiction. *See Stump v. Sparkman*, 435 U.S. 349, 356, 357 (1978) (holding that a judge enjoys absolute immunity for judicial acts within his jurisdiction); *Pierson v. Ray*, 386 U.S. 547, 553-55 (1967). In *Eades v. Sterlinske*, 810 F.2d 723, 726 (7th Cir. 1987), the Seventh Circuit held that while a trial judge acted reprehensibly when he dictated a false certificate about a special verdict conference that was never held, the judge's conduct was nonetheless "cloaked with absolute judicial immunity."

This Court has long recognized that:

> The common-law immunity of a prosecutor is based upon the same considerations that underlie the common-law immunities of judges and grand jurors acting within the scope of their duties. These include concern that harassment by unfounded litigation would cause a deflection of the prosecutor's energies from his public duties, and the possibility that he would shade his decisions instead of exercising the independence of judgment required by his public trust.

Imbler, 424 U.S. at 422-423. Judicial and quasi-judicial immunity allows "functionaries in the judicial system the latitude to perform their tasks absent the threat of retaliatory §1983 litigation." *Snell v. Tunnell*, 920 F.2d

673, 686, 687 (10th Cir. 1990). In *Snell*, the Tenth Circuit followed *Imbler* and stated:

> Because the judicial system often resolves disputes that the parties cannot, the system portends conflict. Win or lose, a party may seek to litigate the constitutionality of circumstances which required him to endure a lawsuit or suffer defeat. Such suits by dissatisfied parties might target judges, (citation omitted) prosecutors and witnesses. (citation omitted) Though such suits might be satisfying personally for a plaintiff, they could jeopardize the judicial system's ability to function.

Id. at 687

Other decisions from this Court serve to buttress the conclusions that the doctrines of judicial and absolute prosecutorial immunity, as discussed in *Imbler*, are firmly established. *See Imbler*, 96 S. Ct. at 989, n. 12 (noting that "few doctrines were more solidly established at common law than the immunity of judges from liability for damages"). *Imbler* recognized that "[t]he immunity of a judge for acts within his jurisdiction has roots extending to the earliest days of the common law." *Imbler*, 96 S. Ct. at 991, n. 20 *citing Floyd v. Barker*, 12 Coke 23, 77 Eng. Rep. 1305 (1608). In *Bradley*, this Court made the following observations about the common law origins of judicial immunity:

> For it is a general principle of the highest importance to the proper administration of justice that a judicial officer in exercising the authority vested in him, shall be free to act upon his own convictions without apprehension of personal consequence to himself. Liability to answer to everyone who might

> feel himself aggrieved by the action of the judge would be inconsistent with the possession of this freedom and would destroy that independence, without which no judiciary can be either respectable or useful. As observed by a distinguished English judge, it would establish the weakness of judicial authority in a degrading responsibility. (*Taaffe v. Downes*, 3 Moore P. C. 41 n.)

Bradley, 80 U.S. at 347.

The common law of England, as adopted in Illinois and other states, recognizes a doctrine of absolute judicial immunity to assure that judges can perform their discretionary function without needless fear of second-guessing. *See, e.g., Generes v. Foreman*, 277 Ill. App. 3d 353, 660 N.E.2d 192 (1st Dist. 1995). In this regard, Illinois has not statutorily abrogated or limited the common law rule of judicial immunity and, moreover, affords quasi-judicial immunity to prosecutors. *See, e.g., White v. City of Chicago*, 369 Ill. App. 3d 765, 861 N.E.2d 1083 (1st Dist. 2006) (holding that prosecutors are absolutely immune from civil liability stemming from acts within the scope of their prosecutorial duties). Prosecutors have the same absolute immunity afforded to the judiciary by the common law of England.

Absolute judicial and prosecutorial immunity applies even where malicious motives are alleged. As this Court explained in *Bradley*:

> The allegation of malicious or corrupt motives could always be made, and if the motives could be inquired into, judges would be subjected to the same vexatious litigation upon such allegations, whether the motives had or had not any real existence.

Bradley, 80 U.S. at 354. In *Generes*, for example, the court emphasized that "'judges of courts of superior or general jurisdiction are not liable to civil actions for their judicial acts, even when such acts are in excess of their jurisdiction, and *are alleged to have been done maliciously or corruptly*.'" *Generes*, 277 Ill. App. 3d at 356 *citing Bradley*, 13 Wall. at 351 (emphasis added). There is no valid distinction between the immunity given to judges and that conferred to prosecutors. Judges and prosecutors must be allowed to do their jobs fearlessly and without fear of lawsuit.

Consideration of the concept of judicial immunity shows that the application of prosecutorial immunity in *Goldstein* is legally untenable. An examination of the structure of judicial and prosecutorial offices in Illinois further shows the shallowness of the analysis in *Goldstein*. In Illinois, judges and prosecutors have similar constitutional grants of authority and perform judicial and quasi-judicial functions, respectively. Illinois judges are State officials. *See Milazzo v. O'Connell*, 925 F. Supp. 1331, 1336 (N.D. Ill. 1996). Under the Illinois Constitution, judges are exclusively authorized to exercise judicial authority. *See* Illinois Const., Art. VI, § 1 (2008) (vesting judicial power in a Supreme Court, an Appellate Court and Circuit Courts). State's Attorneys in Illinois are also State officials and likewise exercise constitutional authority. *Ingemunson*, 133 Ill. 2d at 369, 549 N.E.2d at 1271, 1272; *Rifkin*, 215 Ill. 2d at 478, 831 N.E.2d at 570. Assistant State's Attorneys possess the power of the State's Attorney in the same manner and to the same effect as the State's Attorney. *Office of the Cook County State's Attorney v. Illinois Local Labor Relations Board*, 166 Ill. 2d 296, 303, 652 N.E.2d 301, 304 (2005).

Application of the immunity rule announced in *Goldstein* to lawsuits against judges would be unthinkable and absurd. If, for example, a trial judge erroneously applied the holdings in either *Brady* or *Giglio*, a defendant could not sue the judge. Instead, the defendant could only seek correction through a motion for reconsideration at the trial level or, ultimately, an appeal. The defendant certainly could not sue the trial judge's supervising judge (*e.g.*, a presiding judge within a particular division or the chief judge) for failing to train the trial judge on the proper application of *Brady* and *Giglio*. Yet, that is exactly the approach that the Ninth Circuit adopted in *Goldstein* with respect to the Los Angeles district attorney and his chief deputy. This approach is not consistent with *Imbler* and the doctrine of absolute, quasi-judicial prosecutorial immunity.

B. The Immunity Analysis Endorsed In *Goldstein* Would Eviscerate Prosecutorial Immunity For Prosecutors Who Are State Officials Under The Law Of Their Respective States.

The instant case raises substantial issues concerning the scope of absolute prosecutorial immunity under §1983, as applied to the elected district attorney of Los Angeles County and his chief deputy. Petitioners are sued for acts or omissions based on the alleged failure to develop office wide policies and procedures and the failure to train and supervise deputy district attorneys to properly fulfill their obligations under *Brady* and *Giglio*.

The Cook County State's Attorney's Office, which shares similar duties to the Los Angeles County Dis-

trict Attorney's Office, is the second largest prosecutor's office in the United States.[1] The alleged omissions of Petitioners relate to the manner in which criminal cases are prosecuted in the Los Angeles County District Attorney's office. If affirmed, the Ninth Circuit's opinion in *Goldstein* has far ranging implications and will greatly and adversely impact the day-to-day workings of the Cook County State's Attorney's Office and its Assistants, as well as other prosecutors in large prosecutor's offices across the country.

Under California law, the district attorney is the "public prosecutor" who "shall attend the courts, and within his or her discretion shall initiate and conduct on behalf of the people all prosecutions for public offenses." CALIFORNIA GOVERNMENT CODE §26500. Construing California law, the California Supreme Court has held that, "when preparing to prosecute and when prosecuting criminal violations of state law" and "when training and developing policy in these areas," a district attorney represents the State. *Pitts*, 17 Cal. 4th at 362, 949 P.2d at 934-35.

In Illinois, the office of State's Attorney was created under the judiciary article of the Illinois Constitution. See ILL. CONST., Art. VI, §19 (1970). The duties of the State's Attorney are "To commence and prosecute all actions, suites, indictments and prosecutions, civil and criminal, in the circuit court for his county, in which the people of the State or county may be concerned." 55 ILL. COMP. STAT. 5/3-9005 (2008). Specifically, in Illinois the State's Attorney is a quasi-judicial constitutional

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[1] See the website for the Cook County State's Attorney's office at http://www.statesattorney.org/.

officer vested with the exclusive discretion to initiate and pursue criminal prosecutions. *See People ex rel. Daley v. Moran*, 94 Ill. 2d 41, 45, 445 N.E.2d 270, 272 (1983). In some jurisdictions, the prosecutor is known as a District Attorney and in others as a State's Attorney. For purposes of discussion and the interests of *Amicus* herein, the offices of District Attorney in California and State's Attorney in Illinois are the same and the terms are interchangeable.

The Ninth Circuit's opinion in *Goldstein* would result in an unwarranted narrowing of the scope of absolute prosecutorial immunity with respect to matters within traditional prosecutorial discretion concerning the initiation and management of criminal cases. As a result, in order to avoid the immunity shielding an individual prosecutor in an underlying criminal prosecution, litigants will redirect their claims up the chain of command and simply recast their §1983 claims alleging a failure to supervise, or to develop policies and procedures that would have prevented the alleged constitutional deprivation in an underlying criminal prosecution. In a large prosecutor's office, such as in the one in Cook County, this would increase potential civil rights lawsuits brought by disgruntled criminal defendants on a geometric scale, as each plaintiff names as defendants in his or her case all of the supervisory personnel of courtroom prosecutors, up to and including the elected State's Attorney. The diminution of prosecutorial immunity endorsed in *Goldstein* would effectively multiply the number of prosecutors "made to answer in court each time [a criminal defendant] charged him with wrongdoing" and the number of prosecutors whose "energy and attention would be

diverted from the pressing duty of enforcing the criminal law." *Imbler*, 424 U.S. at 425.

As *Imbler* has been applied, joint decision-making between a line assistant and a supervisor with regard to the management of a particular prosecution is subject to absolute immunity. *See, e.g., Spiegel v. Rabinovitz*, 121 F.3d 251 (7th Cir. 1997). *Spiegel* involved a claim under §1983 for malicious prosecution and violation of the plaintiff's Fifth and Fourteenth Amendment rights, where plaintiff was charged with battery following a confrontation with a neighbor, after which both parties filed complaints with the police. In his claim against the assistant state's attorney who interviewed both parties before deciding to pursue charges against him, rather than the neighbor, the plaintiff alleged that the assistant conducted a willfully incomplete and inadequate assessment of the case. *Spiegel*, 121 F.3d at 254. Rejecting the plaintiff's argument that the assistant functioned as an investigator, not a prosecutor and, therefore, his actions were only entitled to qualified immunity enjoyed by police officers, the Seventh Circuit held:

> In this case, [the Assistant State's Attorney] simply evaluated the evidence assembled. He reviewed the police records, interviewed the parties involved, and then passed on his assessment of the case to his superior. Thus, regardless of whether the decision to prosecute was a joint one or solely in the hands of [the Assistant State's Attorney's] superior, the Assistant State's Attorney is absolutely immune from suit.

Id. at 257.

If the Ninth Circuit's opinion in *Goldstein* had been decided before the plaintiff filed his lawsuit in *Spiegel*, that plaintiff would no doubt have named supervisors higher up the chain of command (or the elected state's attorney himself) as defendants and would have recast his claim as one for failure to train, or failure to institute policies or procedures to ensure that Assistant State's Attorneys properly evaluated his case prior to initiating the prosecution.

The Ninth Circuit's analysis in *Goldstein* would, therefore, create an exception to prosecutorial immunity which would pave the way to lawsuits against supervisors of prosecutors (like the prosecutor in *Spiegel*) who are intimately associated with the judicial phase of the criminal process. To the extent that such supervisors act merely in a supervisory capacity, they should not incur §1983 liability under the doctrine of *respondeat superior*. *Whitman*, 368 F.3d at 936, n. 2. To the extent that prosecutors and their supervisors act as a team in prosecuting a criminal case (and, in so doing, determining their constitutional obligations under *Brady*), they should all be absolutely immune from suit. In either event, such prosecutors and their supervisors should not be subject to liability under §1983. The approach in *Goldstein* eviscerates the prosecutorial immunity that prosecutor's offices require to function as independent fearless advocates for the People.

C. Case Law On Absolute Prosecutorial Immunity Does Not Support The Ninth Circuit's Decision In *Goldstein*.

This Court has long held that prosecutors are entitled to the same absolute, quasi-judicial prosecutorial immunity from suit under §1983 that they have at common law. *Imbler v. Pachtman*, 424 U.S. 409, 96 S. Ct. 984 (1976). This common law immunity has provided prosecutors with freedom to perform their quasi-judicial function without the threat of civil litigation informing the exercise their professional judgment. *Id.* at 423. As this Court has stated:

> The office of public prosecutor is one which must be administered with courage and independence. Yet how can this be if the prosecutor is made subject to suit by those whom he accuses and fails to convict? To allow this would open the way for unlimited harassment and embarrassment of the most conscientious officials by those who would profit thereby. There would be involved in every case the possible consequences of a failure to obtain a conviction.

Id. at 422-423 *citing Pearson* v. *Reed,* 6 Cal. App. 2d 277, 287, 44 P. 2d 592, 597 (1935). Thus, prosecutors have absolute, quasi-judicial immunity from suit even when the lawsuit is based upon allegations that they knowingly suborned perjury and suppressed exculpatory evidence. *Imbler*, 96 S. Ct. at 988, 993-996.

To this end, the common law has long recognized that prosecutors must be given immunity from the chilling effects of civil liability. *Burns v. Reed,* 500 U.S. 478, 485 (1991). Without such a grant of immunity, an array of extra-legal considerations -- such as whether to proceed

with a prosecution at all despite the fear that a witness will unexpectedly change his or her testimony and give rise to a §1983 claim--would bedevil prosecutors. A watering down, or elimination of prosecutorial immunity, would serve only to frustrate the efforts of prosecutors to base their prosecutorial decisions solely on where the evidence leads.

As previously discussed, this Court has employed a functional approach to grant immunity for prosecutorial functions but not administrative or investigative functions. *See, e.g., Buckley v. Fitzsimmons*, 509 U.S. 259 (1993). Neither *Buckley* nor its progeny have spelled out a precise definition of what constitutes an "administrative" or "investigative" function beyond the scope of absolute prosecutorial immunity. In several cases, various plaintiffs have proposed theories of what constitutes administrative and prosecutorial functions that, if accepted, would abolish prosecutorial immunity.

For example, in *White v. City of Chicago*, 369 Ill. App. 3d 765, 861 N.E.2d 1083 (1st Dist. 2006), the plaintiff filed a malicious prosecution action after his acquittal for a double murder. Instead of suing the trial prosecutors, the plaintiffs (like the Respondent here) sued their supervisors. In this regard, the plaintiffs sued a supervising attorney, Murphy, who was assigned to evaluate the evidence accumulated for the prosecution and to interview a new witness. The plaintiffs also sued State's Attorney Richard Devine on the theory that State's Attorney Devine performed an "administrative" function because his office allegedly paid fees to a

witness.[2] The court, however, rejected this argument and held that the efforts of the trial prosecutors and supervisors who work with them are a "joint enterprise." *White*, 369 Ill. App. 3d at 777, 861 N.E.2d at 1094. As a result, the court held that State's Attorney Devine and Murphy were absolutely immune from suit.

In *Buckley*, the plaintiffs argued that prosecutorial immunity should extend only to the initiation of the State's case and "conduct occurring inside the courtroom." *Buckley*, 509 U.S. at 272. This Court rejected this position as "extreme" and foreclosed by *Imbler*. *Id.* *Buckley* stated "that `the duties of the prosecutor in his role as advocate for the State involve actions preliminary to the initiation of a prosecution and actions apart from the courtroom,' are nonetheless entitled to absolute immunity." *Id. citing Imbler*, 424 U.S. at 431, n. 33. This Court further stated that "in particular, an out-of-court effort to control the presentation of a witness' testimony was entitled to absolute immunity because it was 'fairly within [the prosecutor's] function as an advocate.' " *Id. citing Imbler*, 424 U.S. at 431, n.32. *Buckley*, to be sure, recognized that a prosecutor's interview with a potential witness was not an "investigative" function.

In the instant case, Respondent, like the plaintiffs in *White* and *Buckley*, has proposed a reading of the term

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[2] Federal courts have held that a prosecutor is absolutely immune from suit based upon allegations that he arranged for cash payments to prospective witnesses as such alleged "conduct is intimately associated with the judicial phase of a prosecution." *Heidelberg v. Hammer*, 577 F.2d 429, 432, 433 (7th Cir. 1978); *Stokes v. City of Chicago*, 660 F. Supp. 1459, 1460-1462 (N.D. Ill. 1987).

"administrative" that would obliterate the policies underlying absolute prosecutorial immunity. In his separate opinion in *Buckley* concurring in part and dissenting in part, Justice Kennedy recognized the dangers inherent in converting absolute immunity into little more than a pleading rule:

> There is a reason even more fundamental than that stated by the Court for rejecting Buckley's argument that *Imbler* applies only to the commencement of a prosecution and to in-court conduct. This formulation of absolute prosecutorial immunity would convert what is now a substantial degree of protection for prosecutors into little more than a pleading rule. Almost all decisions to initiate prosecution are preceded by substantial and necessary out-of-court conduct by the prosecutor in evaluating the evidence and preparing for its introduction, just as almost every action taken in the courtroom requires some measure of out-of-court preparation. Were preparatory actions unprotected by absolute immunity, a criminal defendant turned civil plaintiff could simply reframe a claim to attack the preparation instead of the absolutely immune actions themselves. *Imbler* v. *Pachtman, supra*, at 431, n. 34. Cf. *Eastland* v. *United States Servicemen's Fund*, 421 U.S. 491, 503-507, 44 L. Ed. 2d 324, 95 S. Ct. 1813 (1975). Allowing the avoidance of absolute immunity through that pleading mechanism would undermine in large part the protections that we found necessary in *Imbler* and would discourage trial preparation by prosecutors. In this way, Buckley's proffered standard would have the perverse effect of encouraging,

> rather than penalizing, carelessness, cf. *Forrester* v. *White, supra*, at 223, and it would discourage early participation by prosecutors in the criminal justice process.

Buckley, 509 U.S. at 283 (Kennedy, J., concurring in part and dissenting in part).

Justice Kennedy's partial concurrence and dissent in *Buckley* illustrates what is problematic about *Goldstein*. When prosecutors and their supervisors (acting outside the courtroom) determine how to properly comply with this Court's decisions in *Brady* and *Giglio*, their conduct pertains exclusively to the initiation and presentation of the State's case at trial. Thus, under *Imbler* and its progeny, a plaintiff may not circumvent the immunity of an individual prosecutor by suing one or more supervising prosecutors for purportedly improperly training, supervising, or setting policy with regard to the disclosure of such informant information for all cases prosecuted by his or her agency. In addition, the decisions of such supervising prosecutors regarding compliance with *Brady* and *Giglio* are "intimately associated with the judicial phase of the criminal process" and hence shielded from liability under *Imbler*.

D. The Diminution Of Prosecutorial Immunity In *Goldstein* Would Cause An Unprecedented And Unwarranted Expansion Of *Brady* Well Beyond The Trial Right That The Due Process Clause Currently Confers.

Relevant to the first issue presented is the consideration that, on the other side of the equation, any circumvention and/or diminution of absolute prosecutorial immunity available to Petitioners in the particular context of this case will result in a corresponding expansion of Respondent's Due Process right to a fair trial implicated *sub judice*. In this regard, Respondent presents an inherently inconsistent position. On the one hand, Respondent claims, and the Ninth Circuit found, that Petitioners' inaction (*i.e.*, failure to develop an office-wide data management system, failure to train and supervise subordinates, and to develop policies with respect to the sharing of *Brady/Giglio* material) violated his due process right to a fair trial during his criminal murder prosecution. *Goldstein*, 481 F.3d at 1172. On the other hand, Respondent claims, and the Ninth Circuit agreed (*id.* at 1175), that Petitioners' inaction was not "intimately associated with the judicial phase of the criminal process" (*see Imbler*, 424 U.S. at 430).

Like the Fifth Amendment's right against Self-Incrimination, however, the due process right to a fair trial is a trial right and violation of it only occurs in the trial setting, *i.e.*, the judicial phase of the criminal process. *See Chavez v. Martinez*, 538 U.S. 760, 767 (2002) (plurality opinion) ("Statements compelled by police interrogations of course may not be used against a defendant at trial, but it is not until their use in a

criminal case that a violation of the Self-Incrimination Clause occurs. . . ." (internal citation omitted)); *United States v. Verdugo-Urquidez*, 494 U.S. 259, 264, (1990) ("The privilege against self-incrimination guaranteed by the Fifth Amendment is a fundamental trial right of criminal defendants. Although conduct by law enforcement officials prior to trial may ultimately impair that right, a constitutional violation occurs only at trial." (internal citation omitted)). If Petitioners' conduct is not intimately associated with the judicial phase of Respondent's criminal prosecution, then the challenged conduct only "transgressed" the prophylactic framework[3] suggested by this Court in *Giglio*, (31 U.S. at 154). *See Smith v. Robbins*, 528 U.S. 259, 265 (2000) ("The procedure we sketched in *Anders* [*v. California*, 386 U.S. 738 (1967)] is a prophylactic one; the States are free to adopt different procedures, so long as those procedures adequately safeguard a defendant's right to appellate counsel.").

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[3] Respondent and the Ninth Circuit incorrectly characterize this prophylactic framework as a constitutional obligation set forth by this Court. It is not. It is merely a suggested framework designed to safeguard the due process right to a fair trial. With respect to an analogous prophylactic procedure set forth by this Court in *Anders v. California*, 386 U.S. 738 (1967), this Court stated, "The Ninth Circuit ruled that this final section of *Anders*, even though unnecessary to our holding in that case, was obligatory upon the States. We disagree. We have never so held; we read our precedents to suggest otherwise; and the Ninth Circuit's view runs contrary to our established practice of permitting the States, within the broad bounds of the Constitution, to experiment with solutions to difficult questions of policy." *Smith v. Robbins*, 528 U.S. 259, 272 (2000).

Certainly, failure to comply with *Giglio*'s prophylactic rule is not a constitutional violation itself. *Kyles v. Whitley*, 514 U.S. 419, 436-37 (1995) ("[T]he Constitution is not violated every time the government fails or chooses not to disclose evidence that might prove helpful to the defense."); *see, e.g., United States v. Patane*, 542 U.S. 630, 641 (2004) (plurality opinion) ("Our cases also make clear the related point that a mere failure to give *Miranda* warnings does not, by itself, violate a suspect's constitutional rights or even the *Miranda* rule."); *Smith v. Robbins*, 528 U.S. at 273 ("In *Pennsylvania v. Finley*, 481 U.S. 551, 95 L. Ed. 2d 539, 107 S. Ct. 1990 (1987), we explained that the *Anders* procedure is not 'an independent constitutional command,' but rather is just 'a prophylactic framework' that we established to vindicate the constitutional right to appellate counsel.... We did not say that our *Anders* procedure was the *only* prophylactic framework that could adequately vindicate this right; instead, by making clear that the Constitution itself does not compel the *Anders* procedure, we suggested otherwise." (internal citation omitted) (emphasis in original)). Of course, the *Giglio*, and even *Brady*, prophylactic framework suggested by this Court sweeps much broader than the Due Process right to a fair trial that it is designed to safeguard. *See Patane*, 542 U.S. at 639. Consequently, if Petitioners' challenged inaction is not intimately associated or connected with Respondent's criminal trial, it follows then, that that conduct, in failing to adopt or implement the *Giglio* prophylactic framework, would not be causally connected to the *Brady/Giglio* violation of Respondent's Due Process right to a fair trial in his murder trial. *See Patane*, 542

U.S. at 641 ("[P]olice do not violate a suspect's constitutional rights (or the *Miranda* rule) by negligent or even deliberate failures to provide the suspect with the full panoply of warnings prescribed by *Miranda*. Potential violations occur, if at all, only upon the admission of unwarned statements into evidence at trial.").

If this Court upholds the Ninth Circuit's denial of absolute immunity, then, necessarily, an unprecedented expansion of Respondent's Due Process right to a fair trial occurs. *See Chavez*, 538 U.S. at 780 (Scalia, J., concurring in judgment) ("§1983 does not provide remedies for violations of judicially created prophylactic rules, such as the rule of *Miranda v. Arizona*, 384 U.S. 436, 16 L. Ed. 2d 694, 86 S. Ct. 1602 (1966), as the Court today holds; nor is it concerned with 'extensions' of constitutional provisions designed to safeguard actual constitutional rights." (internal citations and footnote omitted)). Respondent's Due Process right then becomes commensurate with the *Giglio* prophylactic framework.

But, such an expansion of Due Process trial rights does not pass this Court's "close-fit" requirement because, as Respondent points out, this case presents a very narrow set of facts and extending Due Process to the outer limits of prophylactic rules is not justified. *See Patane*, 542 U.S. at 639 ("But because these prophylactic rules (including the *Miranda* rule) necessarily sweep beyond the actual protections of the Self-Incrimination Clause, any further extension of these rules must be justified by its necessity for the protection of the actual right against compelled self-incrimination. . . ." (internal citations omitted)); 542 U.S. at 643 ("[C]haracterization of *Miranda* as a constitutional rule

does not lessen the need to maintain the closest possible fit between the Self-Incrimination Clause and any judge-made rule designed to protect it."). There is no stopping off point. *Chavez*, 538 U.S. at 779 (Souter, J., concurring in judgment) ("[Respondent] offers no limiting principle or reason to foresee a stopping place short of liability in all such cases. Recognizing an action for damages in every such instance not only would revolutionize Fifth and Fourteenth Amendment law, but would beg the question that must inform every extension or recognition of a complementary rule in service of the core privilege: why is this new rule necessary in aid of the basic guarantee?"(internal footnote omitted)).

Indeed, such an expansion of Respondent's Due Process right to encompass the *Giglio* prophylactic framework in this case would signal a new era of Supreme Court precedent where civil plaintiffs, through the use of §1983 and federal court enforcement, would dictate executive branch prosecutorial policy. By pleading fiat to circumvent absolute prosecutorial immunity, these plaintiffs would, through intimidation brought by vexatious litigation, effectively control local prosecutorial offices' policies on data management, training and supervising employees, and, indirectly, how those offices allocate their fiscal budgets. Such a scenario raises serious questions with respect to federalism and separation of powers. *See Garcetti v. Ceballos*, 547 U.S. 410, 423 (2006) (This scenario "would commit state and federal courts to a new, permanent, and intrusive role, mandating judicial oversight of communications between and among government employees and their superiors in the course

of official business. This displacement of managerial discretion by judicial supervision finds no support in our precedents. * * * To hold otherwise would be to demand permanent judicial intervention in the conduct of governmental operations to a degree inconsistent with sound principles of federalism and separation of powers."); *DeShaney v. Winnebago County Dep't of Social Servs.*, 489 U.S. 189, 203 (1989) (States "may create such a system [of liability for failure to act], if they do not have it already, by changing the tort law of the State in accordance with the regular lawmaking process. But they should not have it thrust upon them by this Court's expansion of the Due Process Clause of the Fourteenth Amendment."). It would also raise significant uncertainties with respect to unconstitutional vagueness. See *Screws v. United States*, 325 U.S. 91, 96-104 (1945) (With respect to criminal counterpart provisionof § 1983, Court construed provision to require specific intent in order to withstand vagueness challenge).

Moreover, as in Fifth Amendment cases, Respondent has already received his remedy when he was released on writ of *habeas corpus*. Normally, the remedy for a *Brady/Giglio* violation is a new trial. *See, e.g., Giglio*, 405 U.S. at 155 (new trial on guilt or innocence); *Brady*, 373 U.S. at 87-91 (new trial on sentencing); *see Patane*, 542 U.S. at 641-42 ("'[t]he exclusion of unwarned statements ... is a complete and sufficient remedy' for any perceived *Miranda* violation." (internal citation omitted)). Thus, there is no justification to expand Respondent's Due Process fair trial right in this manner.

Therefore, this Court should reject Respondent's inherently inconsistent position, find that the chal-

lenged conduct at issue is prosecutorial in function (*Buckley*, 509 U.S. at 272-73) ("We have not retreated . . . from the principle that acts undertaken by a prosecutor in preparing for the initiation of judicial proceedings or for trial, and which occur in the course of his role as an advocate for the State, are entitled to the protections of absolute immunity.")), and reverse the Ninth Circuit's denial of summary judgment on the issue of Petitioners' absolute prosecutorial immunity.

CONCLUSION

For all the foregoing reasons, *Amicus* respectfully requests that the judgment of the United States Court of Appeals for the Ninth Circuit be reversed with directions to reverse the order denying Petitioners' motion to dismiss and to enter an order dismissing the action.

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AMICUS CURIAE BRIEF

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IN THE

Supreme Court of the United States

JOHN VAN DE KAMP and CURT LIVESAY,

Petitioners,

v.

THOMAS LEE GOLDSTEIN,

Respondent.

On Writ of Certiorari to
the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE INNOCENCE NETWORK AND THE INNOCENCE PROJECT AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Should absolute immunity be extended to cover a District Attorney who, in a purely administrative and managerial capacity, intentionally or with deliberate indifference declines to establish any internal system or procedures whatsoever to ensure that prosecutors have access to impeachment information concerning informants, in disregard of the mandate of *Brady v. Maryland*, 373 U.S. 83 (1963), and *Giglio v. United States*, 405 U.S. 150 (1972), and despite knowing of prior repeated *Brady* and *Giglio* violations that resulted from not having such a system or procedure?

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INTEREST OF *AMICI CURIAE*[1]

The Innocence Network (the Network) is an association of organizations dedicated to providing pro bono legal and/or investigative services to prisoners for whom evidence discovered post conviction can provide conclusive proof of innocence. The forty-nine current members of the Network represent hundreds of prisoners with innocence claims in all 50 states and the District of Columbia, as well as Australia, Canada, the United Kingdom, and New Zealand. The Innocence Network and its members[2] are also dedicated to improving the accuracy and reliability of the criminal justice system in future cases. Drawing on the lessons from cases in which the system convicted innocent persons, the Network advocates study and reform designed to enhance the truth-seeking functions of the criminal justice system to ensure that future wrongful convictions are prevented.

Its affiliate, the Innocence Project, is an organization dedicated primarily to providing pro bono legal and related investigative services to indigent prisoners whose actual innocence may be established through post-conviction evidence. It has

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[1] The parties have consented to the filing of this amicus brief and their consent letters have been filed with the Clerk. This brief was not authored in whole or in part by counsel for a party, and no person or entity, other than amici and their members, has made a monetary contribution to the preparation or submission of this brief.

[2] The member entities are listed in the appendix.

a specific focus on exonerating long-incarcerated individuals through use of DNA evidence, including newly-developed DNA testing methods. It also seeks to prevent future wrongful convictions by researching their causes and pursuing legislative and administrative reform initiatives designed to enhance the truth-seeking functions of the criminal justice system—including identifying those who actually committed crimes for which others were wrongfully convicted. Because wrongful convictions destroy lives and allow the actual perpetrators to remain free, the Innocence Project's objectives both serve as an important check on the awesome power of the state over criminal defendants and help ensure a safer and more just society. As perhaps the Nation's leading authority on wrongful convictions, the Innocence Project and its founders, Barry Scheck and Peter Neufeld (both of whom are members of New York State's Commission on Forensic Science, charged with regulating state and local crime laboratories) are regularly consulted by officials at the state, local and federal levels.

In this case, the Innocence Network and Innocence Project seek to present a broad perspective on the issues presented in the hope that the risk of future wrongful convictions will be minimized.

The experience of the Innocence Network and the Innocence Project has demonstrated the unfortunate but substantial role that lying informants play in wrongful convictions. Indeed, in some fifteen percent of the cases in which post-conviction DNA evidence has been used to demonstrate the actual innocence of the person convicted, there had been testimony at trial by an

informant who obviously had been lying.[3] For example, Dennis Fritz and Ron Williamson served eleven years in prison for murder due to the testimony of such informants: one snitch came forward the day before prosecutors would have had to drop charges against Fritz with the claim that Fritz had confessed to him while they shared a jail cell,[4] and another claimed that she had heard Williamson allude to his role in the crime.[5] Only after DNA testing exonerated Fritz and Williamson (and incriminated another government witness as the true perpetrator) were both men released.

Such cases highlight the degree to which perjured testimony from government informants can corrupt our system of justice, and the concomitant necessity of subjecting such testimony to the scrutiny this Court has recognized to be essential. Expanding absolute immunity to those who are

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[3] Innocence Project, *Understanding the Causes*, http://www.innocenceproject.org/understand/Snitches-Informants.php (last visited Aug. 29, 2008); Northwestern University School of Law Center on Wrongful Convictions, *The Snitch System*, http://www.innocenceproject.org/docs/SnitchSystemBooklet.pdf (Winter 2004-2005) (last visited Aug. 29, 2008).

[4] Innocence Project, Profile of Dennis Fritz, http://www.innocenceproject.org/Content/152.php (last visited Aug. 29, 2008).

[5] Innocence Project, Profile of Ron Williamson, http://www.innocenceproject.org/Content/295.php (last visited Aug. 29, 2008).

responsible for the administration of a District Attorney's office but who disregard this Court's rulings on the constitutional right to *Brady* and *Giglio* material by intentionally or with deliberate indifference refusing to establish even minimal administrative procedures to effectuate such rulings will only exacerbate the problem of wrongful convictions based on perjured snitch testimony. Indeed, expanding absolute immunity to administrative functions would also exacerbate a host of related problems of wrongful convictions based on slipshod or even deliberate mishandling of evidence, procurement of known-to-be-unreliable experts, and other wrongdoing known to or recklessly disregarded by prosecutorial offices.

By letters filed with the Clerk of the Court, the parties have consented to the filing of this brief.

STATEMENT OF THE CASE

In the interest of brevity, *amicus curiae* adopts by reference the statement of facts set forth in Respondent's Brief. Certain salient facts, however, stand out.

As set forth in the Second Amended Complaint ("SAC"),[6] Mr. Goldstein's murder conviction was based solely upon exceedingly flimsy and contradictory identification testimony, SAC at 9, and the perjured testimony of the aptly-named Edward Fink, a classic, conniving, jailhouse snitch who falsely claimed that Mr. Goldstein, while in custody, had openly discussed committing the crime. *Id.* at 11. Fink, who had an established and long-standing relationship with the government and who had traded testimony for favors before, was promised leniency on unrelated charges in exchange for his testimony against Mr. Goldstein. While on the witness stand at Mr. Goldstein's trial, however, Fink perjuriously denied the existence of any such deal or favors. *Id.* at 11, 16-19.

Unfortunately, the government withheld from the defense all of the information concerning both Fink's deal and the government's prior favors for Fink, completely depriving Mr. Goldstein of any

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[6] Inasmuch as this case comes to this Court on review of a motion to dismiss the complaint, all well-pleaded allegations of the SAC must be accepted as true. *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955 (2007); *Berkovitz v. United States*, 486 U.S. 531, 540 (1988).

meaningful ability to cross-examine Fink's devastating testimony. SAC at 20.

Withholding this crucial information was not the fault of the prosecutor on Mr. Goldstein's case, who was, like Mr. Goldstein's counsel, ignorant of it. SAC at 20. (Mr. Goldstein seeks no relief against the line prosecutor.) Rather, it was squarely Petitioners' fault, because they, as the people in charge of the management and administration of the District Attorney's office, utterly failed to establish even a rudimentary system or procedure—manual (e.g., index cards), documentary (e.g., a handwritten log or list), computer-based, or otherwise—for ensuring that line prosecutors learn of information concerning informants necessary for compliance with their obligations to defendants under *Brady* and *Giglio*. SAC at 22.

The decision not to create or implement any such system was made at the highest level—not by the individual attorneys involved in Mr. Goldstein's prosecution—and affected all cases in the office in which government informants testified. *Id.* The District Attorney's office was aware, prior to Mr. Goldstein's case, that this abject failure had already resulted in repeated violations of its obligations under *Brady* and *Giglio*. *Id.* at 21. Yet it nevertheless continued, intentionally or with deliberate indifference, to operate without adopting any information management system or other procedure to address these problems. *Id.* Only after a grand jury investigation revealed the vast scope of the problem did Petitioners endeavor to bring their office into compliance with *Giglio*'s mandate. *Id.* at 25.

Without the information to which it was entitled about Mr. Fink's pattern of behavior and the benefits he received in exchange for testifying against Mr. Goldstein, SAC at 19-20, the defense could not effectively cross-examine him. Had this critical impeachment evidence been provided to the defense for use in cross-examination, it would have been obvious to a jury that Mr. Fink could not be credited as a reliable witness and that there was otherwise no legitimate basis for conviction. SAC at 16-19.

As the proximate consequence of Petitioners' administrative failure to establish procedures for compliance with this Court's rulings in *Brady* and *Giglio*, Mr. Goldstein, an innocent man, was imprisoned and ultimately served twenty-four years for a crime he did not commit. SAC at 32. Mr. Goldstein's eventual release on habeas corpus, while vindicating him in principle and providing him at least with prospective relief, did not and could not adequately remedy the grave injustice done to him. By pursuing this lawsuit, Mr. Goldstein has at least a chance to obtain partial justice from those whose blatant misconduct deprived him of his liberty for twenty-four years.

SUMMARY OF ARGUMENT

Absolute immunity for government officials is the exception not the rule. Although this Court has ruled that prosecutors and judges are entitled to absolute immunity while engaged in conduct that is "intimately associated with the judicial phase" of a criminal proceeding, *Imbler v. Pachtman*, 424 U.S. 409, 430 (1976), it has specifically cautioned that the scope of this form of immunity is to be "quite

sparing," *Burns v. Reed*, 500 U.S. 478, 487 (1991) (quoting *Forrester v. White*, 484 U.S. 219, 224 (1988), and that the burden of showing entitlement to absolute immunity is on the person claiming it. *See Buckley v. Fitzsimmons*, 509 U.S. 259, 269 (1993).

By and large, the circumstances in which this Court has held that prosecutors have absolute immunity are either those in which a neutral, third-party decision-maker is in place to ensure a level playing field or those that pertain to strategic decisions made regarding a particular case. *See Burns*, 500 U.S., at 489-93; *Imbler*, 424 U.S., at 430-31. The Court has stressed that, absent such limited circumstances, a defendant is entitled to only the quite substantial protections of qualified immunity in a suit brought under 42 U.S.C. §1983 (2000). *See Buckley*, 509 U.S., at 271-74.

The hurdles for filing, much less prevailing, in a suit such as the instant case are many and high. Even where the defendant is not cloaked with absolute immunity, a §1983 plaintiff shoulders substantial burdens. Overcoming the qualified immunity defense, given its breadth, is a daunting undertaking. But, in addition, the §1983 plaintiff must surmount the often difficult hurdles in proving all of the elements of a constitutional violation as well as legal causation of injury. *See City of Canton v. Harris*, 489 U.S. 378, 389-91 (1989); *West v. Atkins*, 487 U.S. 42, 48-50 (1988); *Martinez v. California*, 444 U.S. 277 (1980).

This Court's jurisprudence has consistently emphasized that absolute immunity is a limited shield that does not apply to administrative or other

decisions that do not bear directly on particular individual cases and that do not concern the prosecutor's role as an advocate. Administrative decisions relating to agency-wide policies or practices are protected only by qualified immunity. The case law reflects a cautious and thoughtful balancing of the need to preserve a sphere of uninhibited discretion for prosecutors acting as State advocates against the necessity of providing a modicum of fair and practical redress for the victims of inexcusable constitutional violations. *Buckley*, 509 U.S., at 269 (quoting *Burns*, 500 U.S., at 487).

The Ninth Circuit's decision that, based on the facts pleaded, Petitioners lacked absolute immunity for the conduct alleged in this case fits squarely within this Court's precedents. Petitioners' failure to establish even a rudimentary form of information clearinghouse or other practical means of complying with *Brady* and *Giglio* was clearly administrative in nature. It related to no particular case, did not fall within an adversarial role, and had no close association with trial preparation.

To use this case to leapfrog over this Court's precedent that even a prosecutor's submission of an affidavit in support of an arrest warrant in a particular case is not entitled to absolute immunity—and instead to expand absolute immunity to insulate individuals who are not involved at all in a particular case, but rather are being sued because they are responsible for broad administrative failures that led ineluctably to predictable violations of criminal defendants' previously recognized constitutional rights—would only compound the tragedy of the wrongful conviction. The potential for municipal liability

under *Monell v. City of New York Dep't. of Soc. Servs.*, 436 U.S. 658 (1978), does not provide adequate protection from these violations. Nor does the possibility of media attention, as the lack of transparency regarding internal decision-making in prosecutors' offices and political realities make it impossible to count on any meaningful deterrence from public opinion.

When a wrongfully convicted individual can show that someone in the government—who is not a prosecutor acting in an adversarial role—has violated a known constitutional right, which proximately deprived that individual of his liberty, it would be grotesquely unjust to deprive him of any ability to obtain practical redress against that governmental official.

An expansion of absolute immunity to cover governmental officials in these circumstances would shield precisely those actions whose cavalier disregard of constitutional rights and judicial decisions are most harmful to the justice system and yet, ironically, are the most easily preventable. There is no good justification for preempting a lawsuit through blanket immunity where the government actor was not in the heat of an adversary proceeding and where there was adequate time to consider which minimally sufficient steps must be taken to comply with clearly established constitutional obligations. To rule otherwise would be to remove an incentive to comply with the Constitution where such incentive would be most efficacious. And there is no reason to believe that the justice system would be threatened by giving an incentive to chief prosecutors to abide by clearly

established law. *Mitchell v. Forsyth*, 472 U.S. 511, 524 (1985).

ARGUMENT

Perhaps the best way to approach Petitioners' arguments is to see how they would play out in the real world. If absolute immunity is granted to prosecutors for their administrative and managerial decisions—including decisions not to comply with judicially-recognized constitutional rights—none of the following individuals could be held liable for the described constitutional violations:

- A chief prosecutor who sets an office-wide policy that *Giglio* material simply is not to be disclosed.[7]

- A chief prosecutor who sets a policy establishing that deals (promises of lesser sentences in pending cases, promises not to indict, promises of financial reward, etc.) with co-operating witnesses should all be done orally (and never memorialized internally by a writing), for the purpose of making deals less likely to be discovered by either the defense or even other line prosecutors who have *Brady* obligations.

- A chief prosecutor or senior deputy who terminates an existing rule

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[7] This scenario is taken from actual events in North Carolina.

requiring line deputies to keep track of deals with or benefits paid to informants and issues a new order mandating that no written records be maintained.

- A District Attorney who instructs his lab's criminalists to write reports only when there is an inculpatory match to the defendant, and to refrain from issuing a report when the data supports a finding of "exclusion." In the alternative, he could instruct the lab to report exclusions as "inconclusive."[8]

- A District Attorney who instructs his deputies always to retain a particular forensic scientist because the chief prosecutor knows she is corrupt and that she will reach whatever conclusion the prosecution wants in every case notwithstanding the objective evidence.[9]

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[8] Similar events occurred recently in California.

[9] *See, e.g., McCarty v. State*, 114 P.3d 1089 (Ok. Ct. Crim. App. 2005) (reversing a conviction based on false testimony from a police chemist who the prosecution was aware had previously given improper and negligently developed testimony).

The patent injustice and absurdity of allowing administrators to disregard constitutionally mandated obligations and rights and to issue blanket policies that blatantly infringe all defendants' rights flouts any civilized notion of due process and demonstrates the vacuity of Petitioners' plea to be extended the impenetrable shield of absolute immunity. Precedent and the horrific experience of the unfortunates in our society who have been victimized by unjust conviction—including Mr. Goldstein, who spent a quarter of a century in prison—demand a different result.

I. The Ambit of Absolute Immunity Under This Court's Decisions Is Limited.

Absolute immunity exists to allow the free exercise of judgment in the prosecution of a case. This Court ruled that a certain amount of discretion in charging decisions and "in the conduct of the trial and presentation of evidence" is necessary for the effective operation of the justice system. *Imbler*, 424 U.S., at 426. The Court has expressed particular concern about the decision to initiate a prosecution and choices regarding the presentation of witness testimony, noting that prosecutors might feel constrained to drop charges in a close case or to refrain from calling particular witnesses to the stand if those choices could later be second-guessed on pain of personal civil liability. *Id.* The fear was that the justice system would be disrupted by retrospective litigation over every aspect of a defendant's trial, and that prosecutors would be inhibited from vigorously and fearlessly pursuing their roles as advocates. *Id.* at 428.

The advocate's role has been central to the concept of absolute prosecutorial immunity as developed in *Imbler* and its progeny. Although prosecutors are entitled to absolute immunity while engaged in conduct that is "intimately associated with the judicial phase," *Imbler*, 424 U.S., at 430, this Court has specifically cautioned that provision of this form of immunity is to be "quite sparing," *Burns*, 500 U.S., at 487 (quoting *Forrester*, 484 U.S., 224). This is at least in part based upon the historical tradition of providing absolute immunity only for prosecutorial decisions that are "intimately associated with the judicial process." *Imbler*, 424 U.S., at 424. Such a historical tradition of immunity for a particular function is "necessary" for a finding of absolute immunity. *Burns*, 500 U.S., at 497-499 (Scalia, J., concurring in the judgment in part and dissenting in part). To the extent that a decision falls outside that ambit, the Court has declined to grant absolute immunity. *Kalina v. Fletcher*, 522 U.S. 118 (1998) (no absolute immunity for statements made in affidavit in support of arrest warrant because prosecutor acted as a witness, not an advocate); *Buckley*, 509 U.S., 269 (no absolute immunity for prosecutors' statements to the press or investigations prior to probable cause determination).

This Court has repeatedly emphasized the exceedingly limited scope of absolute immunity. In *Burns v. Reed*, the Court clearly distinguished between acts intrinsically related to the judicial process and administrative or investigative actions that fall outside absolute immunity's reach. 500 U.S., at 492-93. The conduct of a probable cause hearing, because it involves "appearing before a judge and presenting evidence," and the need for

discretion by the advocate, warrants absolute immunity. *Id.* But providing legal advice to police during the investigative phase of a case does not, partly because there is no history of absolute immunity in such circumstances, and also because there is little danger of "harassment and intimidation" stemming from "vexatious litigation" over legal advice given to investigating officers. *Id.* at 494. By the same token, prosecutors who act as investigators prior to probable cause determinations or who make statements to the public do not act in an advocacy role and thus do not have absolute immunity in such circumstances. *Buckley*, 509 U.S., at 259.

Of course, even when acting outside their role as advocate for the State, prosecutors nonetheless have substantial protection from liability for their actions in the form of qualified immunity. This is anything but a paper tiger. The qualified immunity defense, which provides immunity except "where an official could be expected to know that his conduct would violate statutory or constitutional rights," *Burns*, 500 U.S., at 495 (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 819 (1982)), has been characterized by this Court as granting immunity for "all but the plainly incompetent or those who knowingly violate the law." *Id.* (quoting *Malley v. Briggs*, 475 U.S. 335, 341 (1986)).

And even where a §1983 plaintiff can overcome the daunting threshold barrier of qualified immunity, she must then carry the often difficult burdens of proving all of the elements of the constitutional violation in question, as well as proving that such violation was the legal or proximate cause of the plaintiff's damages. *See City*

of Canton, 489 U.S., at 389-91; *West*, 487 U.S., at 48-50; *Martinez*, 444 U.S., at 277. In this case, for example, one can anticipate Petitioners raising questions as to (1) whether Petitioners' failure to set up an information clearinghouse or other procedure to ensure all line prosecutors' access to impeachment material concerning informant witnesses itself amounts to a violation of what was then a well-established constitutional requirement, (2) whether the failure to do so was intentional, deliberately indifferent, or merely negligent, and (3) whether, as a factual matter, any such violation was the proximate or legal cause of Mr. Goldstein's wrongful conviction and incarceration. Such issues as these (depending on the facts) may provide legitimate grounds for contention and a fair basis for litigation. But we submit that to pretermit Mr. Goldstein's opportunity even to present his proof (including that based on a grand jury investigation of Petitioners' office) through application of absolute immunity would be inconsistent with this Court's cases, unjust, and unwise.

II. The Court Below Correctly Held That Petitioners' Failure To Comply With *Giglio*'s Mandate Was Fundamentally Administrative In Nature and Beyond the Scope of Absolute Immunity.

Every trial attorney knows that impeachment information is absolutely essential to an effective cross-examination in a criminal trial and to the ultimate goal of arriving at a just result. This Court has previously recognized the importance of cross-examining a witness who has cooperated with the government in exchange for leniency because of the substantial danger of false testimony. *Bruton v.*

United States, 391 U.S. 123, 136 (1968). However, false testimony cannot be effectively challenged, much less corrected, if defense counsel is deprived of evidence bearing on the witness's credibility. *Giglio*, 405 U.S., at 154. For the State to allow false evidence to go uncorrected has the same result as an intentional presentation of false evidence. *Id.*, at 153-54. Failure by the government to disclose impeachment evidence is therefore "incompatible with 'rudimentary demands of justice.'" *Id.*, at 153 (quoting *Mooney v. Holohan*, 294 U.S. 103, 112 (1935)). Without relevant information about a witness's biases or interest, the defense cannot cross-examine that witness in the manner that our justice system presupposes.

This Court has recognized the significance of this type of evidence and the concomitant importance of the prosecution's duty to disclose it to the defense. As this Court stated in *Giglio*, this obligation falls not just upon individual attorneys, but upon the office as a whole:

> The prosecutor's office is an entity and as such it is the spokesman for the Government. A promise made by one attorney must be attributed, for these purposes, to the Government. To the extent this places a burden on the large prosecution offices, procedures and regulations can be established to carry that burden and to insure communication of all relevant information on each case to every lawyer who deals with it.

405 U.S., at 154 (citations omitted).

Petitioners intentionally or with deliberate indifference failed to establish even the simplest and most basic administrative safeguards—a file box of index cards, or a handwritten log of informants and their deals—required to comply with *Giglio*, which had issued more than a decade prior to Mr. Goldstein's trial. Even if individual prosecutors strove to the utmost to comply with their obligation to turn over impeachment evidence to the defense, they were hampered by the lack of a central clearinghouse from which to obtain such information. Such a clearinghouse could have been established only by or at the direction of the high-level administrators in the office. But in the case of the Los Angeles County District Attorney's office, the problem was, with deliberate indifference, simply ignored for years, as was the *Giglio* decision itself. Meanwhile, criminal defendants, including demonstrably innocent individuals like Mr. Goldstein, were deprived of vital impeachment information about the government informants who testified against them.

The court below correctly classified Petitioners' failure as administrative action that did not qualify for absolute immunity. The failure to establish any internal system or procedures to ensure access to impeachment information concerning informants, in disregard of this Court's precedents, is not the sort of decision for which prosecutorial discretion must be protected at all costs.[10] It was not "intimately associated with the

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[10] Contrary to Petitioners' office's suggestion, Los Angeles County District Attorney Amicus Br. 6, this is not a case in which a criminal defendant challenges a decision, based on an individualized

judicial phase," *Imbler*, 424 U.S., at 430, or undertaken "in the course of [Petitioners'] role as an advocate for the State." *Buckley,* 509 U.S., at 273. The test for absolute immunity requires that the Court "evaluate the effect that exposure to particular forms of liability would likely have on the exercise of [the relevant] functions," and the party seeking absolute immunity must prove that "overriding considerations of public policy" justify the shield. *Forrester*, 484 U.S., at 224.

The establishment and implementation of a prosecutorial office's internal information sharing system occurs outside the courtroom before the trial, indeed even before the investigative phase, which, as *Buckley* notes, is itself too distant a sphere to warrant absolute immunity. 509 U.S., at 276. No particular case is at issue, for the existence of such information record-keeping predates any particular crime, and there is no entwinement with the advocate's role. Indeed, the function as to whether and how to set up information sharing procedures could be performed by a non-attorney administrator. *See id.*, at 228 (quoting *Ex parte Virginia*, 100 U.S. 339, 348 (1880)(refusing to grant absolute immunity to a judge who discriminated in jury selection because "[t]he duty of selecting jurors might as well have been committed to a private person.")). There is no judge, neutral third party, or adversarial counsel to monitor such administrative decisions,

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assessment of the case, to exclude certain impeachment information from a particular informant's file. Here, Mr. Goldstein has challenged the administrative failure to have no filing system for informant impeachment information at all.

unlike choices about presentation of evidence at trial. There is little danger that hordes of individual defendants would disrupt the justice system by second-guessing this type of prosecutorial conduct if only qualified immunity is granted; very few defendants ever even find out about such impeachment evidence, much less how the inner workings of the district attorney's office affected their ability to obtain that information at trial, and an even smaller percentage would also have invalidated convictions, as is required to bring a cognizable §1983 claim. *Heck v. Humphrey*, 512 U.S. 477 (1994). No "overriding considerations" exist to justify an extension of absolute immunity to cover administrative decisions on whether to bring internal operations into compliance with Supreme Court mandates for disseminating information.

In contrast, the potential (however remote) for individual liability should encourage district attorneys to consider and heed this Court's rulings when making administrative decisions that have global effects but do not interfere with decisions about the strategy or conduct of particular individual cases. Yet, even then, the availability of qualified immunity still protects reasonable, good-faith administrative actions. As this Court has noted, "where an official could be expected to know that his conduct would violate statutory or constitutional rights, he *should* be made to hesitate." *Id.* (quoting *Harlow*, 457 U.S., at 819). If this Court affirms the decision below, only those officials who are "plainly incompetent or knowingly violate the law" would be exposed to any potential liability. *Burns*, 500 U.S., at 495 (quoting *Malley v. Briggs*, 475 U.S. 335, 341 (1986)).

III. Adopting Petitioners' Theory Of Absolute Immunity Would Allow The Worst Of The Worst To Commit Constitutional Violations With Impunity.

Strangely, Petitioners assert that there is "no meaningful difference" between actions of individual prosecutors with respect to *Brady* and the actions of a chief prosecutor concerning policies and training on how all prosecutors in the office should comply with *Brady*. "Setting prosecutorial guidelines in advance through blanket policy or specific training," they say, "is no different in effect than making such decisions in a particular case." Petitioners' Brief at 11. Nothing could be further from the truth.

Petitioners' arguments overlook the obvious and critical point that office-wide policies and training—or decisions to have no policies or training whatsoever—cover many *Brady* and *Giglio* cases, but the actions of a line prosecutor or her direct supervisor deal with only one case. This makes an enormous difference. This Court's precedents establish that balanced public policy should provide absolute immunity to line prosecutors and supervisors for their actions in individual cases but only qualified immunity to chief prosecutors whose decisions affect every prosecutor and every case. That distinction is especially appropriate where, as here, those chief prosecutors knowingly and deliberately adopt, and then maintain, policies that will cause (and already had caused) line prosecutors and supervisors to violate *Brady* and *Giglio* obligations in many cases.

To expand absolute immunity to cover administrative actions would benefit incompetent

chief prosecutors or, worse, those who through apathy or malice establish or tolerate administrative procedures that deprive defendants of constitutional rights recognized by this Court. Their more skilled or less malevolent colleagues are already shielded from liability for administrative acts by qualified immunity. To afford administrators the shield of absolute immunity would be an invitation to disaster. A malevolent, apathetic, or politically ambitious head of a prosecutor's office (or one who wants to enhance the office's conviction rate) could, with impunity, effectively deprive defendants of their liberty through administrative expedients and fiat that are not directed at the conduct of any particular trial or adversarial process, but that in purpose and effect could taint countless trials and the justice system as a whole and wrongly deprive countless defendants (like Mr. Goldstein) of their freedom for decades or their lives.

For example, a district attorney could establish an office-wide mandate requiring the routine, wholesale post-trial destruction of physical evidence that might exculpate criminal defendants with the objective of making it more difficult for innocent defendants to overturn convictions through the use of later-developed scientific or analytic tools. Or an office head might mandate the office-wide use of known, incompetent, corrupt, or malleable medical examiners to conduct autopsies during investigations, with the aim of routinely establishing findings "helpful" to the government. While such individuals might nonetheless escape civil liability under a qualified immunity standard, or on the basis that their conduct was too remote from any particular defendant's loss of liberty to warrant liability, an expansion of absolute immunity to cover

such conduct would grant a dangerous carte blanche. Absolute immunity would shield officials who deliberately or recklessly disregard or flout clear precedents of this Court that established protections for defendants' constitutional rights. If Petitioners' argument is adopted, even a District Attorney who establishes an office-wide policy of denying all impeachment information about government informants to defense counsel would be absolutely immune from suit.

Petitioners, in effect, seek to establish absolute immunity from litigation for conduct which, ironically, most warrants personal liability: that brought by a person who has been wrongfully convicted against the worst of the worst offenders—top executive officials who abuse office-wide authority to ignore and extinguish constitutional rights on a systematic basis.

The abuses exposed in the Los Angeles grand jury report in the 1990s are remarkable, considering their scope and the enormity of the harm caused to the entire criminal justice system. The failure to have any system in place led to the wholesale deception by witnesses of not only defense counsel and judges, but also individual prosecutors. The gravamen of this suit is that such abuses, foretold by *Giglio*, were present when Mr. Goldstein was wrongly convicted precisely because top officials were deliberately indifferent.

Petitioners and their amici suggest that this sort of rampant abuse, even if real and deliberate, should be protected through expansion of absolute immunity. They seek refuge in *Imbler*, but none is there to be found. *Imbler* extended a quasi-judicial,

absolute immunity to line prosecutors. It was thought that such immunity would advance justice so that the honest prosecutor could act fearlessly in advocating and not fear reprisal. Here, we are not speaking of the line prosecutor or the concerns of making decisions in the litigation of a particular case. Rather, we are speaking of top-level, executive officials who make office-wide decisions in deliberate or reckless derogation of constitutional rights.

Most importantly, granting blanket immunity to these executive decisions would have grave consequences for the administration of justice. The scandal in the Los Angeles County prosecutor's office was not the sort of rare, isolated harm contemplated by *Imbler*: a rogue prosecutor deliberately violating the rights of the accused during his trial. Rather, it was the product of a county-wide deception that affected defense counsel, judges and line prosecutors—and defendants—alike. The inaction and disregard from top officials undermined the very foundations of the justice system.

The typical justification for indemnity of line prosecutors, the furtherance of justice, is turned on its head when one speaks of indemnifying the worst of the worst through absolute immunity. The prosecutors (as amici) contend that absolute immunity should even be extended to a chief prosecutor who deliberately and willfully creates such a disruption in the justice system by issuing a directive not to disclose *Giglio* material in any cases and covering up violations that occur. *See, e.g.*, National District Attorneys Association Amicus Br. at 13. It is not clear how the honest prosecutor can act to meet the ends of justice at all in such an environment—irrespective of whether that

disruption is the product of willfulness or deliberately indifference. The corrupt, however, would prosper. Surely, qualified immunity provides more than ample protection in such circumstances.

Imbler is consistent with checks on such rogue prosecutors. The judge in the courtroom maintains order, and the constitution mandates a public trial. For the individually wronged defendant, there are the remedial powers of the trial court and appellate tribunals for redress. For top executive officials, whose decision-making is removed from individual proceedings and tribunals, no such transparency exists. The typical defendant does not understand the inner workings of prosecutors' offices; neither does the public or the media. The necessarily secret nature of how decisions are made in any prosecutor's office—good or bad—means that they are not ordinarily subject to public view. The remedial powers of courts are thus generally unavailable, unlike the context contemplated by *Imbler*. Indeed, the Los Angeles County prosecutor's office itself claims that it could not have known of the abuses taking place in its own office until 1987, although prosecutors within that office were the ones securing the confidential informants. *See* Amicus Curiae Brief in Support of Petitioners by the Los Angeles County District Attorney 5. The County's concession that the lack of controls in the 1990s led to the deception of judges underscores that the administrative decisions of top-level executives lack transparency and cannot be solved simply through criminal trials or related appellate proceedings. *Id.* Neither can they be resolved through discipline from

the state bar.[11] Absolute immunity from civil suits

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[11] Ironically, the most powerful proof that bar discipline is not an adequately effective tool to deter prosecutors from engaging in misconduct, particularly the suppression of *Brady* material, comes from studies recently completed by the California Commission on the Fair Administration of Justice (C.C.F.A.J.), a commission chaired by Petitioner John Van De Kamp.

Examining judicial decisions over the last ten years, the Commission's Prosecutorial Misconduct Report found that there had been 443 reported decisions where courts cited prosecutors for misconduct. In 53 of these cases, convictions were vacated; the remaining cases were generally affirmed on the grounds of "harmless error." Out of those 53 cases where convictions were reversed, and where California judges were therefore required, by law, to refer the prosecutors to the State Bar for discipline, judges did not refer one single case. Of no less importance, a comparison of the misconduct in the harmless error cases and the reversal cases showed that there was no significant difference in the nature of the egregious prosecutorial behavior, primarily suppression of exculpatory evidence and improper arguments. Finally, a review of all the prosecutorial misconduct cases based upon the names of the prosecutors involved showed some of the offending prosecutors had been cited by the courts for engaging in the same misconduct more than once without any bar disciplinary review being commenced. *See* C.C.F.A.J., *Reports and Recommendations*, available at http://www.ccfaj.org/reports.html. (last visited Aug. 29, 2008).

would remove a limited but necessary forum for public scrutiny of constitutional violations. The robust protection of qualified immunity conferred on executive-branch government officials would limit such claims to all but the most egregious violations. And where there are egregious violations, there *should* be liability both to provide a measure of justice and a modicum of deterrence.

IV. Potential *Monell* Liability For A District Attorney's Office Is Not A Sufficient Remedy Or Deterrent For Administrators Who Simply Ignore *Brady* and *Giglio* Or Who Knowingly And Deliberately Adopt Policies And Procedures That Will Systematically Suppress *Brady* and *Giglio* Material.

Some amici argue that absolute immunity should be extended to chief prosecutors because the existence of *Monell* liability (i.e., recourse against the municipality) in some jurisdictions is a sufficient remedy or deterrent. *See* Amicus Curiae Brief of the States 21. The first and best answer is that many District Attorneys' offices and all offices of Attorneys General have absolute, sovereign immunity under the Eleventh Amendment: there can be no *Monell* claims against them. [12] On the other hand, a chief prosecutor or Attorney General who knowingly and deliberately adopts the kind of flagrantly unconstitutional policies described above can be sued

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[12] For example, District Attorneys such as Petitioners are state officials; the City and County of Los Angeles are not liable for their actions. *Pitts v. County of Kern*, 949 P.2d 920 (1998); *Weiner v. San Diego County*, 210 F.3d 1025, 1030 (9th Cir. 2000).

in his or her individual capacity. In non-*Monell* situations, this is the only remedy for a defendant who was wrongly convicted as a direct result of policies that would obviously result in widespread *Brady* and *Giglio* violations. Even if *Monell* were available, the possibility that a municipality would have to pay for customs, policies, or practices of a chief prosecutor does not necessarily serve as much of a deterrent to the individual administrators. It is the municipality, after all, that pays. The money need not even come out of the office's budget.

For top executive officials who are deliberately indifferent to the Constitution or who act willfully to destroy individuals' rights, it is unlikely that *Monell* claims will provide any deterrence at all. Many District Attorneys are elected and hold considerable independent political power. Their tenure in office and political strength is independent of other elected officials and, indeed, often exceeds them. To suggest that claims against New York City, for example, would deter a chief prosecutor—himself a powerful executive officer—misapprehends the political landscape, particularly in New York where each of the city's district attorneys has enjoyed a far longer tenure than its Mayors and has had his own political power base. This type of constitutional violation is likely to fall disproportionately upon discrete and insular minorities with relatively little electoral power. More importantly, the vagaries of the political landscape cannot reliably determine when a high-ranking executive official will be held answerable for constitutional violations.

Equally vacuous is the argument that public censure will prevent such abuse. This argument, of course, defies experience and common sense, for it

presumes that each time there is a constitutional violation in an individual defendant's case, there will be some remarkable interest by the press in covering it, or that the public will care (as opposed to congratulating and reelecting the "overly aggressive" prosecutor). Most errors are not front page news, nor are most lawsuits. But the weakness of the argument lies not only with the mercurial nature of the press and what, from day to day, interests its readers. It ignores the harm caused by absolute immunity itself. Unanswerable to any suits at law, an official may claim with impunity, "I did nothing wrong." Even prosecutors who commit the gravest violations make that assertion, and indeed it echoes in the very proceeding before this Court. If head officials need not appear in court to explain the worst constitutional violations, it is doubtful that the press would ever learn about these problems. Indeed, if prosecutors are deliberately indifferent to this Court's mandates and the laws of the country that they are sworn to uphold, the prospect of a beat reporter showing up at the door will have little effect. An expansion of absolute immunity will only make it more likely that the press will be unable to uncover such abuses.

Civil suits against high-ranking prosecutors (who will still enjoy the exceedingly broad protection of qualified immunity) can afford some means to protect these rights. Even the few suits like Mr. Goldstein's will help assure that the closed-chambered patterns of abuse of by top-level decision-makers will not render *Giglio*'s mandates nugatory.

V. This Court Should Decline To Extend Absolute Immunity To Cover Decisions About Departmental Information Management Policy.

There is no justification for removing entirely any individual incentive for chief prosecutors to provide defendants with due process and a fair trial. Effective incentivization requires retaining at least the possibility—even if seldom invoked at all, much less successfully—that individual government officials could be held personally liable for blatant constitutional violations. To expand absolute immunity to insulate those individuals who are responsible for administrative failures that lead ineluctably to predictable violations of criminal defendants' constitutional rights under *Brady* and *Giglio* would be to compound the tragedy of a wrongful conviction by depriving the victim of a meaningful opportunity to obtain redress from those responsible. Where an individual can show that someone in the government—who is not a prosecutor acting in an adversarial role—has violated or flouted a known constitutional right and thereby deprived that individual of his liberty, it would be grotesquely unjust to deprive that individual of the ability to obtain compensation. An expansion of absolute immunity to cover such government actors in such circumstances would be to shield precisely those actions that are both most harmful to the justice system and also the most preventable. To grant absolute immunity would remove the incentive to comply with the Constitution where such an incentive would be most efficacious.

The policies a chief prosecutor chooses to adopt with respect to *Brady* and *Giglio* obligations

are not made in the heat of litigation of any one particular case, but rather as overall, considered judgments about what the customs, policies, and practices of an office ought to be. They are made with time to reflect and with the knowledge that they will cover every case and the behavior of all prosecutors as well as investigators working for the office or even crime laboratory personnel.[13] Consequently, the knowing adoption of, or failure to adopt, policies, customs, and practices by the chief prosecutor that will obviously result in constitutional violations is an extremely serious matter, far more damaging to the overall functioning of the criminal justice system than an improper decision in a particular case by a line prosecutor.[14]

It must be emphasized that by its very nature a federal civil rights case like this one necessarily involves a plaintiff who has already proven that he or she was wrongfully convicted based upon a *Brady* or *Giglio* violation and seeks to demonstrate further that the chief prosecutor was deliberately indifferent to customs, policies, or practices in the office that gave rise to such constitutional violations. This is not, as Petitioner and a number of the amici seem to believe, a situation where a chief prosecutor can be

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[13] Some District Attorney's offices oversee their own regional crime labs. *See* n.8.

[14] *Cf. Canton*, 489 U.S., at 390 (finding *Monell* liability where "the need for more or different training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that the policymakers of the city can reasonably be said to have been deliberately indifferent to the need").

held liable for merely negligent conduct—recovery is not available under those circumstances. Rather, there must be deliberate indifference or recklessness by prosecutors, and even then they could be covered by qualified immunity if there was no showing of bad faith conduct that would obviously result in recurring constitutional violations.

Amici contend that if absolute immunity is not expanded, prosecutors will be unable to enforce the law or even will be unable to follow it. They claim that the prospect of lawsuits against top-level officials will inhibit line prosecutors, who enjoy absolute immunity, from making clear-headed decisions and disclosures concerning the constitutional rights of the accused and inhibit them from reporting errors as well as wrongful conduct. Were that the case, the solution would be simple: hire honest advocates. Extending absolute immunity beyond that necessary for litigation of the particular case and for heat of the moment decisions does not promote justice, but devalues the integrity of the system. It must be assumed that those who prosecute crime can make decisions that are not deliberately indifferent to or intentionally violative of constitutional protections, or are, for that matter, criminal. Protecting the decisions made by those actively engaged in litigation is one thing. But extending that protection to others more distant from the judicial process would logically lead to granting absolute immunity to an unending number of people. Police officers investigating the case, a person giving a statement, a lab analyst performing a scientific test all would now need to be granted the invincibility of absolute immunity so that the prosecutor could feel comfortable reporting their errors, or even malfeasance. Such an expansion

would be as unwarranted as it would be unhealthy for our justice system.

Petitioners and amici also raise the specter of mass disruption of prosecutors' offices due to a flood of litigants similarly situated to Mr. Goldstein. As an office dedicated to freeing the wrongly convicted, the Innocence Project is quite curious about Petitioners' and amici's concern that there will be a "flood." We note that their concern about a flood of litigation seems not to be matched by an admission that there has been a "flood" of wrongful convictions. And if there has been no flood of wrongful convictions, there certainly can be no flood of attendant civil suits under §1983.

In fact, Mr. Goldstein's path in this litigation is quite unusual and not easily replicated. He was not only wrongly accused, but wrongly convicted by a jury of his peers. His appeals failed and he remained in prison for twenty-four years. He was eventually able to prove that he was wrongly convicted and released from prison. This arduous ordeal fulfilled only the basic prerequisite for filing a claim. Claims for wrongful conviction, or derivatives of such suits, may ordinarily be filed only after one establishes the invalidity of the underlying conviction. *Heck*, 512 U.S., at 487.

Vindication of trial-based rights through vacatur and dismissal of the original conviction is only the beginning of what must be satisfied in order to prevail. The mere assertion of a constitutional violation is not enough. A wrongfully convicted individual must plead and ultimately prove the deliberate indifference to or intentional violations of established constitutional rights. But even this is

not sufficient, because he must prove that such intent or deliberate indifference came not from the line prosecutor who convicted him or even from an immediate supervisor with whom the line prosecutor consulted. Rather, as here, it must be related to an *administrative* policy that was deliberately indifferent to—or intentionally attacked—a clearly established constitutional right. And that is simply the beginning of the basis to assess whether one has a colorable claim.

Though reflexively latching onto language in *Imbler* that is to their liking, suggesting an open torrent of claims, Petitioners' and amici's argument is illusory. Careful review of the trial record could reveal no underlying constitutional violation whatsoever. Indeed, this is often the case in DNA exonerations. The wrongly convicted often have no practical means of obtaining redress except for legislatively created no-fault remedies where they exist. *See, e.g.*, 18 U.S.C. §3600A (2004).

The Innocence Project's experiences have highlighted an additional obstacle as well: in most cases, wrongful convictions cannot be revealed through DNA testing. The Innocence Project receives thousands of letters each year. Of these, only a small portion of cases can be researched to see whether DNA testing can be dispositive of innocence or guilt. Only about two percent of these cases receive assistance from the Innocence Project. For many, the evidence has been lost or destroyed, so no testing can be done at all. For others, results range from inconclusive to inclusive to exculpatory. The number of cases where wrongful conviction can be established is rather limited. For those who were convicted but nevertheless were factually innocent,

attempting to prove their innocence without the gold standard of DNA, vacatur and dismissal is much more difficult to achieve.

For those claims stemming from acquittal at trial, it becomes harder still to imagine a viable lawsuit. In addition to proving that a senior member of the prosecutor's office promulgated an order or failed to implement a policy that either intentionally or with deliberate indifference violated a known constitutional right, one would also have to establish harm. Precisely because he was found not guilty, the acquitted claimant would have an exceedingly difficult time showing that the failure to disclose *Giglio* material proximately caused the harm necessary to sustain the §1983 claim.

Mr. Goldstein's case provides a truly rare example in which all of these requirements for suit are met. The link between his wrongful conviction and the chief prosecutor's failure to establish a system for sharing *Giglio* material is obvious, and the simple solution that could have saved him even more so.

CONCLUSION

For the foregoing reasons, and those presented by the Respondent, the judgment below should be affirmed.

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APPENDIX

APPENDIX

The Innocence Network member organizations include the Alaska Innocence Project, Arizona Justice Project, Association in the Defence of the Wrongly Convicted (Canada), California & Hawaii Innocence Project, Center on Wrongful Convictions, Connecticut Innocence Project, Cooley Innocence Project (Michigan), Delaware Office of the Public Defender, Downstate Illinois Innocence Project, Georgia Innocence Project, Idaho Innocence Project (Idaho, Montana, Eastern Washington), Indiana University School of Law Wrongful Convictions Component, Innocence Network UK, The Innocence Project, Innocence Project Arkansas, Innocence Project New Orleans (Louisiana and Mississippi), Innocence Project New Zealand, Innocence Project Northwest Clinic (Washington), Innocence Project of Florida, Innocence Project of Iowa, Innocence Project of Minnesota, Innocence Project of Texas, Kentucky Innocence Project, Maryland Office of the Public Defender, Medill Innocence Project (all states), Michigan Innocence Clinic, Mid-Atlantic Innocence Project (Washington, D.C., Maryland, Virginia), Midwestern Innocence Project (Missouri, Kansas, Iowa), Mississippi Innocence Project, Montana Innocence Project, Nebraska Innocence Project, New England Innocence Project (Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, Vermont), North Carolina Center on Actual Innocence, Northern Arizona Justice Project, Northern California Innocence Project, Office of the

Public Defender, State of Delaware, Ohio Innocence Project, Pace Post Conviction Project (New York), Rocky Mountain Innocence Project, Schuster Institute for Investigative Journalism at Brandeis University Justice Brandeis Innocence Project (Massachusetts), Texas Center for Actual Innocence, Texas Innocence Network, The Reinvestigation Project of the New York Office of the Appellate Defender, University of British Columbia Law Innocence Project (Canada), University of Leeds Innocence Project (Great Britain), and the Wisconsin Innocence Project.

AMICUS CURIAE BRIEF

(12)

No. 07-854

IN THE

Supreme Court of the United States

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SUPREME COURT, U.S.

JOHN VAN DE KAMP, ET AL.,

Petitioners,

v.

THOMAS LEE GOLDSTEIN,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR THE STATES OF KANSAS, ALABAMA, ALASKA, ARIZONA, ARKANSAS, CALIFORNIA, COLORADO, CONNECTICUT, DELAWARE, FLORIDA, GEORGIA, HAWAII, IDAHO, ILLINOIS, INDIANA, IOWA, KENTUCKY, LOUISIANA, MAINE, MARYLAND, MASSACHUSETTS, MICHIGAN, MINNESOTA, MISSISSIPPI, MISSOURI, MONTANA, NEBRASKA, NEVADA, NEW HAMPSHIRE, NEW MEXICO, NEW YORK, NORTH CAROLINA, NORTH DAKOTA, OHIO, OKLAHOMA, OREGON, PENNSYLVANIA, RHODE ISLAND, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, TEXAS, UTAH, VERMONT, VIRGINIA, WASHINGTON, WEST VIRGINIA, WISCONSIN, WYOMING & THE DISTRICT OF COLUMBIA AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether supervising prosecutors are entitled to absolute immunity from money damages in a suit under 42 U.S.C. § 1983 when the trial prosecutors they are supervising have absolute immunity?

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INTEREST OF THE *AMICI* STATES

The States have a paramount interest in whether supervisory prosecutors—a group that includes the Attorneys General of the fifty States, the District of Columbia, and several U.S. territories—are protected by absolute prosecutorial immunity when the trial attorneys they supervise allegedly commit constitutional errors or violations in circumstances where the trial attorneys themselves have absolute prosecutorial immunity.

The question whether supervising prosecutors share the same absolute immunity as the trial prosecutors they supervise is of great practical importance to the Attorneys General. To the best *Amici* can determine, *every* Attorney General's office has the power to handle criminal prosecutions in at least some circumstances. Furthermore, it appears that *every* Attorney General's office actually handles criminal prosecutions, at least occasionally, and many do so on a daily basis.

Not surprisingly, the Attorneys General offices are organized in multiple ways, with varying responsibilities for criminal prosecutions. In some, the Attorney General's office handles *all or virtually all* criminal prosecutions, examples being Alaska, Delaware, and Rhode Island, as well as some U.S. territories such as American Samoa, the Northern Mariana Islands, and the U.S. Virgin Islands. *State Attorneys General Powers and Responsibilities*, Ch. 17 ("Criminal Justice"), at 5 (Emily Myers & Lynne Ross eds., National Association of Attorneys General 2d ed. 2007) (hereinafter "*Attorneys General Powers*"). Most, if not all, states authorize the Attorney General to handle a criminal prosecution

when a local prosecutor has a conflict of interest, *id.* at 6, or specifically requests the assistance of the Attorney General, for example in a complex case. *Id.* Many states give their Attorneys General jurisdiction to prosecute violations of specific areas of the law such as antitrust, consumer fraud, environment, health care fraud, and securities fraud. *Id.* at 5-6. And some states give their Attorneys General jurisdiction over serious crimes such as murder and major felonies. *Id.* at 5.

Although the prosecutorial models for Attorneys General offices vary, two indisputable facts emerge from a review of the States. **First**, *all* Attorneys General appear to have the authority to handle criminal prosecutions in at least some circumstances. **Second**, considered cumulatively, the Attorneys General are actively prosecuting hundreds, if not thousands, of criminal cases on a daily basis.

Thus, the question whether supervisory prosecutors will be accorded the same absolute immunity as the trial prosecutors they oversee is of considerable practical importance to the Attorneys General and other supervisory prosecutors in their offices, such as division chiefs, high-ranking deputies, and task force leaders. Adopting the Ninth Circuit's approach in this case would open all high-ranking state prosecutors to significant new potential liability, a result both unfair and unwarranted. Indeed, the Ninth Circuit's holding invites vexatious, harassing litigation by criminal defendants against supervisory prosecutors. Simply put, the Attorneys General and other supervisory state prosecutors are likely—indeed, probable—targets for Section 1983

litigation if the Ninth Circuit's decision in this case is not reversed.

SUMMARY OF THE ARGUMENT

1. The absolute immunity of prosecutors in suits under 42 U.S.C. § 1983 is derived in large part from absolute judicial immunity. *Imbler v. Pachtman*, 424 U.S. 409 (1976). Like the judges who preside, *Pierson v. Ray*, 386 U.S. 547 (1967); *Stump v. Sparkman*, 435 U.S. 349 (1978), and the witnesses who testify, *Briscoe v. LaHue*, 460 U.S. 325 (1983), in judicial proceedings, prosecutors receive absolute immunity for their participation in the judicial phase of the criminal process. *Imbler*. The reasons for this absolute immunity are several, but primary among them is the protection of the judicial process by precluding vexatious and retaliatory civil lawsuits against those participating in that process, including judges, witnesses, and prosecutors. Absolute prosecutorial immunity is just as important to the public and the criminal justice system as it is to the individual prosecutors who may be the targets of vexatious and retaliatory civil litigation by criminal defendants.

2. For situations such as this case, the Court should articulate two bright-line rules. These rules are faithful both to the common law immunity tradition the Court has adopted in Section 1983 actions and to the policies further justifying absolute prosecutorial immunity. **First**, when a Section 1983 plaintiff alleges that a trial prosecutor committed a constitutional violation that affected the integrity, accuracy, or fairness of a criminal trial, the trial prosecutor is entitled to absolute immunity because

such claims necessarily are "intimately associated with the judicial phase of the criminal process." *Imbler*, 424 U.S. at 430. **Second**, supervisory prosecutors must be accorded at least the same level of immunity as the trial prosecutors they oversee.

a. The first rule is effectively stated and applied in all of the Court's prior prosecutorial immunity cases. That said, making it clear to the lower courts that there is such a bright-line rule would avoid unnecessary litigation and ensure that absolute prosecutorial immunity is given its proper scope. Any claim that necessarily calls into question the fairness or accuracy of the plaintiff's previous criminal prosecution also necessarily implicates the "judicial phase" of the criminal process. This rule would complement and operate much like the rule of *Heck v. Humphrey*, 512 U.S. 477 (1994), which precludes the use of Section 1983 to bring claims that necessarily implicate the validity of a criminal conviction or sentence, unless and until the conviction or sentence has been invalidated or called into question in some other forum.

b. The second rule follows from the first—indeed, the Ninth Circuit's decision in this case is inherently illogical in light of the first rule. It makes no sense to grant absolute immunity to a street-level official who could even act with malice in violating constitutional rights, while simultaneously granting that person's supervisor—or someone only indirectly supervising through one or more layers of mid-level supervisors—a lesser immunity. Paradoxically, the Ninth Circuit acknowledged that a supervisory prosecutor is entitled to absolute immunity if that person participates directly in the challenged actions of the

trial prosecutor. *See Goldstein v. City of Long Beach*, 481 F.3d 1170, 1174 (9th Cir. 2007). That being the case, it is both illogical and unfair to then adopt a rule giving *less* immunity to a supervisory prosecutor whose only "fault" may have consisted of ignorance, inattention or negligence.

If a Section 1983 plaintiff alleges a constitutional violation sufficiently connected to the judicial phase of the criminal process to justify granting absolute immunity to the trial prosecutor, then that same connection to the judicial phase of the criminal process automatically should accord the same immunity to supervisory prosecutors. Thus, the correct analysis really boils down to a single step: if the alleged constitutional violation is intimately associated with the judicial phase of the criminal process, then *any and all* prosecutors either *directly or indirectly* involved in the situation are entitled to absolute prosecutorial immunity.

c. Beginning with *Imbler*, the Court consistently has recognized that there are more appropriate remedial measures if and when prosecutors commit constitutional mistakes or violations, including post-trial motions, direct appeal of a wrongful conviction, post-conviction proceedings challenging a wrongful conviction, the prospect of attorney disciplinary proceedings against prosecutors who fail to live up to high ethical standards, and—in an egregious case—perhaps even the possibility of criminal charges against a prosecutor who has violated a defendant's constitutional rights. The answer is not a civil suit for money damages against supervisory prosecutors.

3. Finally, Respondent's claim in this case—that Petitioners failed to adopt a policy that would have prevented potential *Giglio* violations—should fail as a matter of law, even apart from the question of absolute prosecutorial immunity.

a. First, nothing in the Court's opinion in *Giglio v. United States*, 405 U.S. 150 (1972), declares or suggests that the Court was imposing a constitutional duty on supervising prosecutors to adopt policies or provide training to line prosecutors regarding potential *Giglio* violations. Instead, *Giglio*, like its ancestor, *Brady v. Maryland*, 373 U.S. 83 (1963), recognizes a trial right, a violation of which is held against the state itself, not against various individual prosecutors who may have some level of involvement in a particular case.

b. Second, the Court has never declared that "supervisory liability" even exists under Section 1983. Many Circuits have allowed such liability, but the Circuits generally have done so in cases involving officials who have only *qualified immunity*, such as police and public school officials. The situation in which a supervisor oversees officials who have absolute immunity presents different considerations, and those considerations cut against imposing supervisory liability on prosecutors.

Vicarious liability is not permitted in Section 1983 actions, nor has the Court ever recognized negligence as a basis for Section 1983 liability. Thus, a negligent failure to adopt a policy to prevent *Giglio* violations, or a negligent failure to provide training to trial prosecutors regarding *Giglio* violations, could not be a constitutional violation. Yet, negligence

appears to be the very essence of Respondent's claim against Petitioners. Moreover, if a supervisory prosecutor is a "final policymaker" for a county or city, the municipal entity itself may be liable for the prosecutor's actions, *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658 (1978); *City of St. Louis v. Praprotnik*, 485 U.S. 112 (1988), making supervisory liability duplicative and unnecessarily expansive.

ARGUMENT

I. ABSOLUTE PROSECUTORIAL IMMUNITY APPLIES IN THIS CASE

A. The Court's Prior Decisions Establish That Prosecutors Are Entitled To Absolute Immunity For All Functions "Intimately Associated With The Judicial Phase Of The Criminal Process"

The text of Section 1983 does not speak to immunities. *Imbler v. Pachtman*, 424 U.S. 409, 417 (1976) (Section 1983 "creates a species of tort liability that on its face admits of no immunities"); *Buckley v. Fitzsimmons*, 509 U.S. 259, 268 (1993) ("Section 1983, on its face admits of no defense of official immunity.") Nonetheless, the Court has assumed that Congress did not intend to abrogate immunities that government defendants enjoyed under the common law when Section 1983 was enacted in 1871. *E.g., Tenney v. Brandhove*, 341 U.S. 367, 376 (1951) (Congress did not intend to abrogate immunities "well grounded in history and reason"); *Pierson v. Ray*, 386 U.S. 547, 554 (1967) (Section 1983 not meant "to abolish wholesale all common-law immunities"); *Burns v. Reed*, 500 U.S. 478, 484 (1991) (same). Thus, the Court has looked to 19th

century common law to determine the immunities of Section 1983 defendants. *E.g., Tenney, supra*; *Pierson, supra*; *Kalina v. Fletcher*, 522 U.S. 118 (1997).

In Section 1983 cases against prosecutors, the Court has recognized that two common law absolute immunities—judicial immunity and defamation immunity—apply to prosecutorial functions. *See, e.g., Imbler*, 424 U.S. at 421-23, *Burns*, 500 U.S. at 499-501 (Scalia, J., concurring in part and dissenting in part). In particular, though, the Court's prosecutorial immunity cases make clear that absolute prosecutorial immunity has a close and significant connection to—indeed, essentially derives from—the well-recognized absolute judicial immunity of the common law.

In *Imbler* the Court held that prosecutors have absolute immunity for all functions "intimately associated with the judicial phase of the criminal process." 424 U.S. at 430. Thus, prosecutors acting as advocates in court proceedings necessarily take on the established common law absolute judicial and defamation immunities. *Burns, supra*; *Kalina, supra*. The Court's subsequent prosecutorial immunity cases all apply the *Imbler* absolute immunity standard.

But in *Imbler* the Court expressly declined to address the question whether prosecutors are entitled to absolute immunity for functions either "investigative" or "administrative" in nature. *Kalina*, 522 U.S. at 125 (in *Imbler*, the Court "put to one side 'those aspects of the prosecutor's responsibilities that cast him in the role of an administrator or investigative officer rather than that of advocate'")

(quoting *Imbler*, 424 U.S. at 430-31). Subsequent cases have addressed prosecutor immunity in the context of "investigative" functions, *e.g.*, *Mitchell v. Forsyth*, 472 U.S. 511 (1985); *Burns*, *supra*, *Buckley*, *supra*, *Kalina*, *supra*, but no decision of the Court has squarely addressed how to draw a line between prosecutorial functions "intimately associated with the judicial phase of the criminal process" and those that are instead only "administrative" in nature.

By virtue of Respondent's creative efforts to evade the absolute immunity accorded the trial prosecutor here, this case squarely presents the question of what constitutes an "administrative" function in the prosecutorial context. That question can only be answered by reference to the fundamental proposition *Imbler* established: "administrative" prosecutorial functions cannot include any function "intimately associated with the judicial phase of the criminal process." As explained below, absolute prosecutorial immunity is both necessary and appropriate here for the very same reasons the Court first recognized such immunity in *Imbler*.

B. Office Policies Addressing The Conduct Of Criminal Cases, As Well As The Training Of Trial Prosecutors Regarding The Conduct Of Criminal Cases, Necessarily Are Intimately Related To The Judicial Phase Of The Criminal Process

1. The Court's "Functional" Approach To Section 1983 Immunities Makes Clear That Absolute Prosecutorial Immunity Applies Here

The Court consistently utilizes a "functional" approach in determining individual immunities in Section 1983 cases. *See, e.g., Forrester v. White*, 484 U.S. 219, 224 (1988) ("Running through our cases, with fair consistency, is a 'functional' approach to immunity questions"); *Kalina*, 522 U.S. at 122, 124-31; *Buckley*, 509 U.S. at 268-78; *Imbler*, 424 U.S. at 430-31. Under this approach, "[the Court] examine[s] the nature of the functions with which a particular official or class of officials has been lawfully entrusted, and [the Court] seek[s] to evaluate the effect that exposure to particular forms of liability would likely have on the appropriate exercise of those functions." *Forrester*, 484 U.S. at 224.

The functional approach eschews simplistic characterization of prosecutor activities as "prosecutorial" or "administrative" in an abstract or general sense. Instead, the Court's focus is on whether the activity is likely to give rise to vexatious and harassing litigation by criminal defendants if prosecutors are not protected by absolute immunity. Thus, a critical reference point in determining the "function" a prosecutor is performing is the potential

effect that *not* providing absolute immunity may have on a prosecutor's freedom to make decisions regarding matters such as whether to commence a prosecution, what charges to bring, and the evidence to use at trial. *Imbler*, 424 U.S. at 423-31.

Importantly, the functional approach does not examine the prosecutor's activity in the abstract. Rather, the focus properly and necessarily is on the precise subject matter to which the activity relates, the purpose of the prosecutor's activity, and the activity's significance when viewed in the overall context of the criminal justice system. *Imbler* is an illustration. There, the Court evaluated whether a prosecutor's request that police refrain from questioning a witness until after the witness testified at trial was "investigation" or "advocacy." 424 U.S. at 430 n.32. The Court did not simplistically focus on the prosecutor's action as "a direction to police officers engaged in the investigation of the crime" *id.*, but instead explained that, "[s]een in its proper light . . . [the prosecutor's] request was an effort to control the presentation of his witness' testimony, a task fairly within his function as an advocate." *Id.*

Proper application of the Court's functional approach in this case compels the conclusion that the Petitioners should be afforded absolute prosecutorial immunity. Petitioners' alleged activity should not be viewed only in abstract terms as general "administrative" tasks of supervision, policymaking, and training. At the highest level of generality, it would be relatively easy to label many, if not most, supervisory prosecutor activities "administrative." But the Court has made clear that Section 1983 immunity determinations cannot be made at such

abstract and high levels of generality. *See, e.g.*, *Anderson v. Creighton*, 483 U.S. 635, 639-40 (1987).

Rather, Petitioners' alleged failings in this case must be examined more carefully and in context. Here, Respondent complains about the handling of potential impeachment evidence that he has a constitutional right to obtain. With that focus in mind, the Court must consider both the role that such evidence plays in the criminal justice system and whether the threat of litigation concerning prosecutors' involvement in potential *Giglio* violations would impair the ability of prosecutors to perform their duties with the freedom and courage that the judicial system requires. As described below in Part III.A., *Giglio* is essentially a trial right, and thus policies or training regarding such rights necessarily are intimately related to the judicial phase of the criminal process. A threat of vexatious civil litigation by criminal defendants over such a trial right could create timidity on the part of prosecutors in regard to the handling and disclosure of impeachment and exculpatory evidence, ultimately compromising our adversarial system.

The Ninth Circuit erred in large part because that court applied the functional approach at a high level of generality. The Ninth Circuit failed to evaluate the supervision, policymaking, and training at issue in light of both the subject matter involved and the relationship of those activities to the larger context of criminal prosecutions. *Goldstein*, 481 F.3d at 1175-76. The Ninth Circuit also failed to evaluate the Petitioners' alleged activities in light of the question whether civil litigation arising from such activities could impair prosecutorial decision-making. *Id.*

Instead, the Ninth Circuit placed heavy weight on the mere fact that the "policy" at issue was not related to a specific prosecution, erroneously concluding that Respondent's claim had "a close connection only to how the District Attorney's Office was managed . . . ." *Id.*

The Ninth Circuit in effect adopted a rule that making general policy or providing training, unlike decisions in particular criminal prosecutions, is *per se* an "administrative" function protected only by qualified immunity. The reality is that drawing such a line between "prosecutorial" and "administrative" functions is both artificial and ill-advised. Instead, supervisory prosecutors often are involved in activities that have both "prosecutorial" and "administrative" aspects, just like judges are frequently involved in activities that are both "judicial" and "administrative" in a general sense. The D.C. Circuit, unlike the Ninth Circuit, recognizes that there is "no meaningful distinction between a decision on prosecution in a single instance and decisions on prosecutions formulated as policy for general application." *Haynesworth v. Miller*, 820 F.2d 1245, 1269 (D.C. Cir. 1987) (footnotes omitted), *abrogated on other grounds by Hartman v. Moore*, 547 U.S. 250 (2006).

The inevitable uncertainty of Section 1983 litigation against supervisory prosecutors would frustrate a primary goal of absolute prosecutorial immunity, which is to permit prosecutors to execute their public duties without fear of vexatious and retaliatory civil litigation over their decisions. *Imbler*, 424 U.S. at 423-31; *Haynesworth*, 820 F.2d at 1269-70 ("The threat of litigation [for the policy

maker] is very real, and indubitably would inhibit the performance of prosecutorial duties."). Under the Ninth Circuit's approach, supervisory prosecutors could face vexatious and retaliatory Section 1983 litigation no matter what they do in terms of adopting policies and providing training. "If supervisory officials understand that they could invite litigation by their attempts to cabin prosecutorial zeal through the issuance of policy statements, they might well opt to leave individual prosecutors without clear guidance or control." *Haynesworth*, 820 F.2d at 1270 n.199. On the other hand, if supervisors do not adopt policies and provide extensive training on every aspect of criminal prosecutions, they also may be sued. Such results are neither necessary nor desirable.

2. The Ninth Circuit Incorrectly Defined "Administrative" Functions In The Prosecutorial Immunity Context

For purposes of Section 1983 absolute immunities, "administrative" functions must be limited to those that do not directly or indirectly relate to the substantive duties and responsibilities of the government defendant. Thus, when a judge demotes or dismisses staff, the judge is engaged in "administrative" functions rather than a "judicial" act, because such conduct is not directly or even indirectly related to the judge's decisions in pending cases. *See Forrester*, 484 U.S. at 224. But if a judge orders an officer to bring the attorney in a pending case before the judge, such activity is necessarily related to the judicial process, cloaking the judge with absolute immunity. *Mireles v. Waco*, 502 U.S. 9 (1991) (*per curiam*).

The same analysis should apply to prosecutors. Policies, procedures, and training regarding the conduct of criminal prosecutions necessarily implicate the core substantive duty of prosecutors—to enforce the laws through the criminal justice system. In effect, the adoption of policies and the provision of training are a substitute for the personal involvement of supervisory prosecutors in each and every criminal case. In jurisdictions of any size, it is impossible for supervisory prosecutors to be personally involved in every case.

It is no answer to say that absolute immunity protects only the actual withholding or presentation of evidence at trial in violation of a constitutional rule. Such an approach, which the Ninth Circuit effectively adopted here, makes it far too easy to circumvent absolute prosecutorial immunity. *Cf. Buckley*, 509 U.S. at 283 (1993) (Kennedy, J., concurring in part and dissenting in part) ("Were preparatory actions unprotected by absolute immunity, a criminal defendant turned civil plaintiff could simply reframe a claim to attack the preparation instead of the absolutely immune actions themselves."); *id.* at 284 ("Just as *Imbler* requires that the decision to use a witness must be insulated from liability, it requires as well that the steps leading to that decision must be free of the distortive effects of potential liability, at least to the extent the prosecutor is engaged in trial preparation.")

Ultimately, the conclusion is inescapable that Petitioners' alleged failings in this case are on the same side of the absolute immunity line as the judge's conduct in *Mireles v. Waco* (ordering officer to bring an attorney before the judge), but on the

opposite side of the line as the judge's conduct in *Forrester v. White* (demoting and dismissing a staff member). The adoption of policies regarding criminal prosecutions, as well as the training of prosecutors handling cases, are simply not "administrative" functions in the meaning of this Court's prior immunity decisions. Instead, such functions are intimately associated with the judicial phase of the criminal process, and thus protected by absolute prosecutorial immunity.

II. APPLYING LESS THAN ABSOLUTE PROSECUTORIAL IMMUNITY IN THIS CONTEXT WILL LEAD TO ILLOGICAL RESULTS AND ADVERSE EFFECTS ON THE CRIMINAL JUSTICE SYSTEM

A. Supervisory Prosecutors Must Be Accorded At Least The Same Level Of Immunity As The Trial Prosecutors They Oversee

As a strong general rule, the Court has accorded Section 1983 defendants the same immunity when they are performing the same function. This is a natural result of the Court's focus on "function," not status, supra, Part I.B.1, in individual immunity cases. Thus, police and prosecutors both receive qualified immunity when performing "investigative" functions. *See, e.g., Burns, supra*; *Buckley, supra*. And witnesses receive the same immunity they would have received at common law—absolute immunity for "testifying" witnesses and qualified immunity for "complaining" witnesses—irrespective of whether the witness is a prosecutor, police officer, other government official, or a private citizen. *See, e.g., Kalina, supra*; *Briscoe, supra*.

The same equality of immunity should operate here. Respondent complains of a *Giglio* violation. Necessarily, whoever commits or contributes to a *Giglio* violation, a trial right, is engaged in the same function. It makes no sense to hold that a trial prosecutor who fails to disclose impeachment evidence receives absolute immunity—a proposition that no one disputes in this case—while a supervisor who may be ignorant, inattentive, or at worst negligent, receives a lesser immunity.

Because *Giglio* and *Brady* violations involve trial rights, they necessarily are intimately associated with the judicial phase of the criminal process. Indeed, *Imbler* itself involved a *Brady* claim, and the Court applied absolute immunity to that claim. 424 U.S. at 409, 431 n.34; *see also, Buckley v. Fitzsimmons*, 20 F.3d 789, 794 (7th Cir. 1994), *cert. denied*, 513 U.S. 1085 (1995) (a *Giglio* violation "would in any event be comfortably within the scope of absolute prosecutorial immunity under *Imbler*"). Any claim that necessarily calls into question the fairness or accuracy of the plaintiff's previous criminal prosecution also necessarily implicates the "judicial phase" of the criminal process. This rule would complement and operate much like the rule of *Heck v. Humphrey*, 512 U.S. 477 (1994), which precludes the use of Section 1983 to bring claims that necessarily implicate the validity of a criminal conviction or sentence, unless and until the conviction or sentence has been invalidated or called into question in some other forum.

A *Brady* or *Giglio* violation is intimately associated with the judicial phase of the criminal process no matter whom the Section 1983 plaintiff may sue, nor

precisely how the violation occurred. Ultimately, there is only one constitutional violation attributable to the government, not several violations committed by several different individual prosecutors. As a result, all prosecutors the plaintiff might sue as Section 1983 defendants must be accorded at least the same immunity as the trial prosecutor who handled the criminal case.

B. The Ninth Circuit's Approach Leads To Illogical Results And Invites Vexatious, Retaliatory Litigation

The anomalous potential result of the Ninth Circuit's holding is that a supervisor who actively and even maliciously participates in the violation of a criminal defendant's trial rights is entitled to absolute immunity. But a supervisor who fails to adopt an office policy, adopts an inadequate policy, fails to train trial prosecutors about a potential violation, or inadequately trains them, has only qualified immunity. That result is backwards.

The appropriate rule in this context is to accord the supervising prosecutor at least the same level of immunity as the trial prosecutor. Otherwise, any alleged violation by trial prosecutors can be turned into a claim against supervisors, necessarily leading to vexatious and retaliatory litigation. The ironic and illogical result of the Ninth Circuit's rule is that it is possible, if not probable, that a less culpable actor—*e.g.*, a supervisor who may have no actual knowledge of a trial prosecutor's conduct—will have less immunity than the more culpable trial prosecutor who willfully or even maliciously violates a criminal defendant's trial rights. Indeed, the Ninth Circuit

conceded that a supervisory prosecutor who actively participates in a constitutional violation has absolute immunity, *Goldstein*, 481 F.3d. at 1174, but nonetheless reached the illogical conclusion that a supervisor whose fault may be ignorance, inattention, or negligence only has qualified immunity.

Opening the door to "failure to supervise or train" claims against supervising prosecutors will lead to harassing and unfounded litigation. The targets of such suits will be not just local district attorneys, but also state Attorneys General, the Attorney General of the United States, and the many deputies and division chiefs assisting those individuals.

Unlike absolute immunity, qualified immunity cannot always be resolved easily and early in the litigation process. Facts, and factual disputes, become much more important in the qualified immunity context, at a minimum making discovery much more likely in such cases, and in some cases requiring a trial for final resolution. The Court long has emphasized that much of the value and substance of absolute immunity is lost if a Section 1983 defendant who is entitled to such immunity is compelled to go through discovery and even trial, irrespective of whether the defendant ultimately prevails. *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985) ("absolute immunity . . . is effectively lost if a case is erroneously permitted to go to trial"); *Imbler*, 424 U.S. at 419 n.13 ("absolute immunity defeats a suit at the outset"). Those consequences need not and should not be imposed on supervisory prosecutors in cases such as this one.

C. Significant Measures Remain To Remedy And Deter Prosecutor Mistakes And Misconduct

Going back to *Imbler*, the Court has recognized that absolute immunity is appropriate for prosecutor activities intimately associated with the judicial phase of the criminal process in part because significant other measures remain available to remedy and deter prosecutor errors or misconduct. Section 1983 suits against prosecutors for money damages are not the answer. "The ultimate fairness of the operation of the [judicial] system itself could be weakened by subjecting prosecutors to § 1983 liability." *Imbler*, 424 U.S. at 427.

The Court has recognized that there are many other ways to deal with prosecutor error and misconduct, all more appropriate than permitting civil suits for money damages against participants in the judicial process. In particular, *Imbler* identified five such measures: (1) the remedial powers of the criminal trial judge; (2) direct appeal of criminal convictions; (3) post-conviction proceedings, both state and federal; (4) disciplinary measures against prosecutors for violations of any ethical rules; and (5) in an extreme case, potential criminal prosecution of a prosecutor under statutes such as 18 U.S.C. § 241 and 18 U.S.C. § 242. *See* 424 U.S. at 427, 429.

Further, though not specifically identified in *Imbler*, injunctive claims against prosecutors may sometimes be appropriate. Absolute immunity only protects prosecutors against claims for money damages. It is not a defense, for example, to injunctive claims seeking to restrain enforcement of an unconstitutional law or rule. *See, e.g., Ex Parte*

Young, 209 U.S. 123 (1908); *Supreme Court of Va. v. Consumers Union*, 446 U.S. 719 (1980).

Also available is the possibility of municipal liability. Since *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658 (1978), cities and counties have been subject to suit under Section 1983 as "persons" within the meaning of the statute. Though municipalities cannot be held liable on a *respondeat superior* basis, they can be liable when an "official policy or custom" causes a constitutional deprivation. Unlike individual officials, municipal entities have *no immunity* from suit, either personal, *Owen v. City of Independence*, 445 U.S. 622 (1980), or constitutional, *Lincoln County v. Luning*, 133 U.S. 529 (1890).

Thus, if a supervisory prosecutor is a "final policymaker" for a municipality, *City of St. Louis v. Praprotnik*, 485 U.S. 112 (1988), then that official's decisions may create policy that results in constitutional harm for which the municipality is liable under Section 1983. (Of course, if the supervisory prosecutor is considered a "state"—rather than municipal—official, then no municipal liability arises. *McMillian v. Monroe County*, 520 U.S. 781 (1997)). Such a "policy" may include the "failure to train or supervise" municipal employees. *City of Canton v. Harris*, 489 U.S. 378 (1989). The point is that a municipality itself may sometimes be subject to the remedies of Section 1983, providing yet another reason not to expand Section 1983 liability to include individual supervisory prosecutors.

"[S]afeguards built into the judicial system tend to reduce the need for private damages actions as a means of controlling unconstitutional conduct." *Butz*

v. Economou, 438 U.S. 478, 512 (1978). Moreover, the judicial system and the public have substantial interests at stake here. "The affording of only a qualified immunity to the prosecutor also could have an adverse effect upon the functioning of the criminal justice system." *Imbler*, 424 U.S. at 426.

Thus, because of absolute immunity, litigants may not sue the judge who presided over their trial or other judicial proceeding, *Pierson v. Ray*, 386 U.S. 547 (1967), *Stump v. Sparkman*, 435 U.S. 349 (1978), the prosecutor who presented the government's case, *Imbler*, the witnesses who testified in those proceedings, *Briscoe v. LaHue*, 460 U.S. 325 (1983), the grand jurors who indicted them, *DeCamp v. Douglas County Franklin Grand Jury*, 978 F.2d 1047, 1050-51 (8th Cir. 1992), nor, on a somewhat different basis, the public defenders who represented them. *Polk County v. Dodson*, 454 U.S. 312 (1981). The same justifications for such absolute immunities apply with at least as much force in this case.

III. "SUPERVISORY LIABILITY" IS NOT APPROPRIATE HERE

Respondent's claim in this case—that the Petitioners failed to adopt a policy that would have prevented potential *Giglio* violations should fail as a matter of law for two reasons independent of the question of prosecutorial immunity.

A. *Giglio v. United States*, 405 U.S. 150 (1972), Does Not Impose A Constitutional Duty On Supervisory Prosecutors To Create Policies Or Provide Training

Giglio v. United States, like its foundation, *Brady v. Maryland*, 373 U.S. 83 (1963), effectively creates a

trial right—the right to examine and use evidence in the government's possession that may impeach government witnesses. A *Giglio* violation occurs when the trial prosecutor fails to disclose such evidence at the appropriate time. But, it is the state itself which commits the violation, not an individual official. *Giglio*, 405 U.S. at 154 ("The prosecutor's office is an entity and as such it is the spokesman for the Government.")

Nothing in *Giglio* declares or suggests that the Court was imposing a constitutional duty on supervising prosecutors to adopt policies or to train trial prosecutors regarding potential *Giglio* violations. *See, e.g.*, 405 U.S. at 154 (noting only that large prosecution offices "can" establish procedures and regulations to ensure compliance if they choose). Rather, it is the very withholding of the evidence that is the constitutional wrong. And that wrong is attributed to the government as a whole for purposes of reversing a defendant's conviction. *Giglio*, 405 U.S. at 154 (the act of any individual prosecutor "must be attributed, for these purposes, to the Government"). Because there necessarily is only a single constitutional violation, it is not clear that a supervisory prosecutor who does not personally withhold nor order the withholding of evidence even can commit a *Giglio* violation.

B. Section 1983 "Supervisory Liability" Should Not Apply When Those Being Supervised Have Absolute Immunity

The Court has never addressed the question whether "supervisory liability" is a basis for Section 1983 liability. (Indeed, the question here is like the

second question presented in *Ashcroft v. Iqbal*, No. 07-1015, *cert. granted*, 76 U.S.L.W. 3654 (U.S. June 16, 2008), a *Bivens* suit against high-ranking federal law enforcement officials, including the nation's former chief prosecutor).

Perhaps the only case even to implicate such a claim was *Rizzo v. Goode*, 423 U.S. 362 (1976), in which plaintiffs sued various supervisory city officials for alleged police misconduct. The Court was highly skeptical of the plaintiffs' claims. In particular, the Court observed that the district court made findings of fact regarding instances of misconduct by individual police officers, but "there was no affirmative link between the occurrence of the various incidents of police misconduct and the adoption of any plan or policy by [the supervisory city officials] express or otherwise showing their authorization or approval of such misconduct." *Id.* at 371. Reversing a grant of injunctive relief, the Court continued, "[i]nstead, the sole causal connection . . . was that in the absence of a change in police disciplinary procedures, the incidents were likely to continue to occur . . . ." *Id.* at 371. Reversing a grant of injunctive relief, the Court observed that a "heated dispute between individual citizens and certain policemen has evolved into an attempt by the federal judiciary to resolve a 'controversy' . . . over what steps might, in the Court of Appeals' words, '(appear) to have the potential for prevention of future police misconduct." *Id.* (quoting *Goode v. Rizzo*, 506 F.2d 542, 548 (3d Cir. 1974)).

It appears that most of the Circuits have read *Rizzo* to allow "supervisory liability" in at least some Section 1983 cases. Typically, though, "supervisory

liability" cases in the lower courts have involved claims about the supervision of police or public school officials who themselves have only *qualified immunity*. *See, e.g.*, Martin A. Schwartz & John E. Kirklin, *Section 1983 Litigation*, Vol. 1B, Claims and Defenses § 7.19 ("Supervisory Liability") at 124-31 (John Wiley & Sons 3d ed. 1997) (collecting cases).

Prosecutors present a very different situation than police and school officials. Indeed prosecutor "supervisory liability" cases are rare in the Circuits, with good reason. Unlike prosecutors, police officers and public school officials—whether street level or the very top executive—have only qualified immunity. It is one thing to hold that the supervisor of a police officer or school official who only has qualified immunity also receives only qualified immunity. There is a parity in such a conclusion that is at least arguably consistent with the Court's focus on "function" in immunity cases, and supervisory liability in such cases does not necessarily lead to illogical results.

But the very notion of "supervisory liability" makes little sense when the supervisor is overseeing street-level officials who themselves have absolute immunity. Such a rule defies the Court's general rule of equality of immunity based on equality of function. Further, such a rule would invite the evasion of the street-level officials' absolute immunity by the simple expedient of naming supervisors as Section 1983 defendants and arguing that their failure to "supervise" or "train" is protected only by qualified immunity. For these reasons and others, Respondent's "supervisory liability" claim should fail

as a matter of law independent of the prosecutorial immunity determination.

Furthermore, allowing the imposition of supervisory liability in Section 1983 cases against prosecutors raises difficult but critical questions regarding the standards for such liability. One problem is a state of mind requirement. The Court's cases cannot be more clear or emphatic, ever since *Monell, supra*, that *respondeat superior* is not a basis for imposing liability under Section 1983. Thus, in Section 1983 cases, supervisory prosecutors cannot be held vicariously liable for the constitutional mistakes or violations of the trial prosecutors they supervise, nor can they be held liable simply because they had the authority to control those prosecutors.

Likewise, the Fourteenth Amendment's Due Process Clause cannot be violated by merely negligent conduct. *Daniels v. Williams*, 474 U.S. 327 (1986). So a negligent failure to adopt a policy to prevent *Giglio* violations, or a negligent failure to train trial prosecutors regarding *Giglio* violations, could not be a due process violation. Indeed, the Court has rejected negligence as a sufficient basis for imposing liability under Section 1983 on a municipal entity for "failure to train" employees. *See, e.g., City of Canton v. Harris*, 489 U.S. 378 (1989); *cf. Bd. of County Comm'rs of Bryan County v. Brown*, 520 U.S. 397 (1997) (no "negligent hiring" claims under § 1983). Moreover, although the Court has held that "deliberate indifference" is sufficient for "failure to train" liability against municipal entities, the Court at the same time has declined to decide whether deliberate indifference or recklessness would establish a due process violation. *See, e.g., Daniels v.*

Williams, 474 U.S. 327, 334 n.3 (1986); *Davidson v. Cannon*, 474 U.S. 344, 349 (1986) (Brennan, J., dissenting); *DeShaney v. Winnebago County Dep't of Soc. Servs.*, 489 U.S. 189, 202 n.10 (1989).

In any event, the Court faces a similar question in *Ashcroft v. Iqbal*, No. 07-1015, *cert. granted*, June 16, 2008, with the difference that *Iqbal* is a *Bivens* suit against a former federal Attorney General, rather than a Section 1983 suit. That said, the Court long has held that the immunities available to individual defendants are the same in Section 1983 and *Bivens* suits, *Butz v. Economou*, 438 U.S. 478, 500 (1978), with the exception of the President alone, who generally has absolute immunity, *Nixon v. Fitzgerald*, 457 U.S. 731 (1982) (unlike state governors, *Scheuer v. Rhodes*, 416 U.S. 232 (1974)). Thus, a decision that the suit in *Iqbal* cannot be maintained may have some bearing on the supervisory liability aspect of this case.

Rather than opening the door to "supervisory" liability for prosecutors, which necessarily will lead to vexatious and retaliatory litigation, the Court should apply absolute prosecutorial immunity here.

CONCLUSION

The Ninth Circuit's decision threatens supervisory prosecutors, including the Attorneys General, their deputies, and their division chiefs, with the prospect of vexatious and retaliatory civil litigation brought by criminal defendants. For the reasons set forth above, the judgment should be reversed.

Respectfully submitted,

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In The
Supreme Court of the United States

JOHN VAN DE KAMP
and CURT LIVESAY,

Petitioners,

v.

THOMAS LEE GOLDSTEIN,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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INTEREST OF AMICI[1]

Amici Curiae write, research, and teach in the fields of Constitutional Law, Civil Rights, and Criminal Justice, with particular focus on the enforcement of civil rights laws and the protection of constitutional rights. They are interested in this case because its outcome will affect the scope of absolute prosecutorial immunity, a doctrine that frequently deprives victims of a remedy for even willful prosecutorial misconduct, and because they believe that the interpretation of § 1983 should reflect the history of the Reconstruction era in which it was enacted.

Amici are **Vikram Amar**, Associate Dean for Academic Affairs and Professor of Law at the University of California, Davis, School of Law, **Erwin Chemerinsky**, Dean and Distinguished Professor of Law at the University of California, Irvine, School of Law, **David Cole**, Professor of Law at the Georgetown University Law Center, **Randy Hertz**, Professor of Clinical Law and the Director of Clinical and Advocacy Programs at the New York University School of Law, **Burt Neuborne**, the Inez Milholland Professor of Civil Liberties at New York University School of Law and the Legal Director of the Brennan

---

[1] Pursuant to Rule 37, letters of consent from the parties have been filed with the Clerk of the Court. In accordance with Rule 37.6, amici state that no counsel for either party has authored this brief in whole or in part, and no person other than amici curiae or their counsel has made a monetary contribution to the preparation or submission of this brief.

Center for Justice, **Charles Ogletree**, the Jesse Climenko Professor of Law at Harvard Law School and the Director of the Charles Hamilton Houston Institute for Race and Justice, **Barry Scheck**, Professor of Law at the Benjamin N. Cardozo School of Law and Director of the Innocence Project, and **Carter C. White**, King Hall Civil Rights Clinic, University of California, Davis, School of Law.

SUMMARY OF THE ARGUMENT

Following the Civil War, the Reconstruction Congress sought to restructure the legal and moral foundation of the nation by eliminating slavery, granting citizenship to former slaves, and providing effective redress for the deprivation of civil rights. But this enlightened effort faced complex, intransigent resistance. Former Confederates seized control in many parts of the South and launched a campaign of revenge against newly freed slaves, Union supporters, and federal officials. This was no mere vigilantism; it also included state-sanctioned malicious prosecutions of Union officers and federal officials for attempting to enforce federal laws.

To counter this resistance, Congress adopted the Civil Rights Act of 1866, the Fourteenth Amendment (ratified in 1868), and the Ku Klux Klan Act of 1871 (§ 1 of which is codified as 42 U.S.C. § 1983). The history of the enactment of these measures makes one thing clear: Congress was far more concerned

with providing a robust federal response to – and federal remedy for – civil rights abuses in the South than it was with preserving any then-existing common law tort immunities for some of the very same actors who were wreaking havoc in former slave states.

The Court has repeatedly held that § 1983 must be interpreted in light of the historical context (including the congressional intent) of 1871, the year that the 42nd Congress enacted the Ku Klux Klan Act. While noting that § 1983's text provides for no immunities, the Court has concluded that Congress did not intend to eliminate well-established common law immunities that existed when the statute was enacted. *See Tenney v. Brandhove*, 341 U.S. 367 (1951) (upholding legislative immunity). Understandably unwilling to substitute its policy preferences for a legislative enactment, however, the Court has made clear that when "a tradition of absolute immunity did not exist as of 1871, we have refused to grant such immunity under § 1983." *Burns v. Reed*, 500 U.S. 478, 498 (1991) (Scalia, J., concurring in part and dissenting in part). Moreover, because the undisputed purpose of § 1983 was to create liability for unlawful conduct of state officials, the Court has always stressed that it would confer absolute immunity sparingly. *See Imbler v. Pachtman*, 424 U.S. 409, 434 (1976) (White, J., concurring) ("[T]o extend absolute immunity to any [class] of state officials is to negate *pro tanto* the very remedy which it appears Congress sought to create.").

The common law as of 1871 did not confer absolute immunity for prosecutorial conduct. No court held a prosecutor absolutely immune until 1896, and such immunity was not firmly established until some fifty years after the Ku Klux Klan Act. The relevant species of absolute immunity that did exist in 1871 – "judicial immunity" for adjudicative conduct and "defamation immunity" for statements made or offered in court – did not provide immunity for all the conduct we associate today with the prosecution of criminal cases. Instead, the common law of the Reconstruction era provided the equivalent of qualified immunity to persons performing most prosecutorial functions, who were held liable only for malicious misconduct.

Given the absence of a common law tradition of absolute prosecutorial immunity in 1871, the historical basis for the Court's decision in *Imbler* is questionable. Nonetheless, *Imbler's* requirement of an "intimate" nexus between the challenged prosecutorial conduct and the "judicial phase of the criminal process," *id.* at 430, does have some footing in the common law of the period. Amici recognize that some prosecutorial functions are analogous to conduct that received absolute immunity as of 1871, *e.g.*, statements made or evidence offered by the prosecutor at trial or in grand jury proceedings (conduct at least resembling that to which defamation immunity applied in 1871), or a prosecutor's quasi-adjudicative weighing of evidence in deciding whether to commence a prosecution (conduct bearing at least some – if only a tenuous

– relation to that to which judicial immunity applied in 1871).

But Petitioners' administrative conduct bears no resemblance to any function protected by absolute immunity in 1871. Therefore, even if the Court retains *Imbler's* approach to prosecutorial immunity, the Court should not expand it to cover Petitioners' highly injurious managerial failure here. So limiting the scope of absolute immunity for claims that a state actor has violated § 1983 is consistent with the intent of the Congress that enacted that watershed statute; extending absolute immunity to cover the unlawful prosecutorial conduct asserted here is not.

Because the conduct alleged – a management decision not to implement a system to disseminate information to staff – is so far removed from the judicial process and would not remotely have been protected by the absolute immunities available in 1871, the decision below should be affirmed.

ARGUMENT

I. THE RECONSTRUCTION CONGRESS PASSED SWEEPING NEW LEGISLATION TO PROVIDE EFFECTIVE REDRESS FOR THE DEPRIVATION OF CONSTITUTIONAL RIGHTS

In 1857, Chief Justice Taney concluded that no descendant of an imported slave, even if born in America to parents who had been emancipated, could

be a citizen of the United States. *Dred Scott v. Sanford*, 60 U.S. (19 How.) 393 (1857). That decision was anathema to abolitionists and the Republican Party; indeed, President Lincoln's Attorney General soon opined that, contrary to the *Dred Scott* decision, free men of color, if born here, were citizens of the United States. 10 Op. Att'y Gen. 382 (1862). But *Dred Scott* remained the law.

The Civil War profoundly changed the legal landscape. After slavery was abolished by the Thirteenth Amendment, the Republicans – who had won greater than 70% majorities in both houses of Congress during the 1864 elections – set out to repudiate *Dred Scott*. They did so with the Civil Rights Act of 1866, ch. 31, 14 Stat. 27 (1866), and the Fourteenth Amendment (ratified in 1868). Those enactments made clear that "[a]ll persons born or naturalized in the United States . . . are citizens of the United States and of the State wherein they reside[,]" U.S. CONST. amend. XIV § 1, and that all citizens enjoy certain privileges and immunities. *Id.* Congress plainly intended that no person acting under color of the law of any State (including any former slave state), would be permitted to violate the civil rights of any citizens, whatever their race or political affiliation. *See* ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION 243 (1988) (describing how Republicans succeeded in enacting legislation to prohibit any law or custom of a State from violating what Sen. Trumbull described as

the "'fundamental rights belonging to every man as a free man'").

A. Congress acted to combat violence and abusive prosecutions in the South

Republicans controlled Congress, but the former slave states hardly shared their view of what Union victory in the Civil War should mean for the country. After Appomattox, many in the South mounted a campaign of terror against former slaves, federal agents, and Union sympathizers. *See* REPORT OF CARL SCHURZ ON THE STATES OF SOUTH CAROLINA, GEORGIA, ALABAMA, MISSISSIPPI AND LOUISIANA, S. EXEC. DOC. NO. 2, 39th Cong., 1st Sess., at 5 (1865) (describing groups of "incorrigibles" who "persecute Union men and negroes whenever they can do so with impunity").

The violence was rampant. Certain former Confederates and their sympathizers seized control of state and local governments and launched a vengeful campaign of abusive criminal and civil prosecutions against Union supporters and federal officials who tried to enforce federal policies following the war. *See* David Achtenberg, *With Malice Toward Some: United States v. Kirby, Malicious Prosecution, and the Fourteenth Amendment*, 26 RUTGERS L.J. 273, 275 (1995). As one newspaper explained, in Kentucky, Confederates and their sympathizers "have possession of the courts; they constitute the juries, they are legislators, judges, magistrates, sheriffs, constables, jurors, and

with the spirit of disloyalty, they intend to take vengeance upon those who have been zealous in the cause of the Union." *Id.* at 298. More than three thousand such prosecutions were brought in Kentucky alone against former Union soldiers. *See* CONG. GLOBE, 39th Cong., 1st Sess. 2054 (1866) (remarks of Sen. Wilson) (attributing the numerous prosecutions to Kentucky's refusal to transfer such cases to federal court).

Southern officials used their judicial systems to frustrate Reconstruction and intimidate federal officers. When federal officials used force to arrest violators of the Civil Rights Acts, they often were indicted unlawfully for assault or murder. *See* ROBERT J. KACZOROWSKI, THE POLITICS OF JUDICIAL INTERPRETATION: THE FEDERAL COURTS, DEPARTMENT OF JUSTICE AND CIVIL RIGHTS, 1866-1876, at 23 (2005). Southern prosecutors also targeted Union military commanders and officials of the Freedmen's Bureau who sought to enforce the 1866 Civil Rights Act. *See* MELVIN I. UROFSKY AND PAUL FINKELMAN, A MARCH OF LIBERTY: A CONSTITUTIONAL HISTORY OF THE UNITED STATES 441 (2d ed. 2002) (describing reports of "countless" lawsuits by Southerners against federal officials).

News of these malicious prosecutions designed to deprive persons of their civil rights reached the highest officials in Washington. For example, in 1866, United States Attorney Benjamin H. Bristow wrote to Attorney General James Speed to explain that state prosecutions were being initiated against Union supporters and federal officials in an apparently

concerted attempt to force them to leave the state. *See* Achtenberg, *supra*, at 329. General John M. Palmer, the Union military commander in Kentucky, wrote directly to Attorney General Speed to relate that he had repeatedly been indicted for "aiding slaves escape" merely because he had issued travel passes to former slaves. *Id.* at 299. He also was subjected to civil lawsuits commenced by prominent officials, including a congressman and a senator, for tens of thousands of dollars based on the supposed value of slaves he had helped to free. *Id.* As he explained, "there are twenty thousand crimes for which I am punishable and Congress will have to pass a law extending my life – lengthen it out a few thousand years that I may [serve] this punishment." *Id.*

In response to this wave of lawless prosecutions, General Ulysses S. Grant issued an Order forbidding state courts from prosecuting federal officials for actions taken within the scope of their authorized duties. *See* General Order 3, Jan. 12, 1866. The Order further sought to curb state prosecutors' abuse of the judicial system by requiring them to punish African Americans in the "same manner and degree" as every other citizen. *Id.* The abuses of the judicial system were so pervasive that, as part of the first Civil Rights Act, Congress gave federal authorities the power to take control of state criminal prosecutions if a fair result could not be achieved. *See* Civil Rights Act of 1866, ch. 31, 14 Stat. 27 § 3 (1866). During the first year this law was in effect, the Commissioner of the Freedman's Bureau, the agency charged with

handling the administration of cases removed from state court, estimated that their courts handled 100,000 complaints concerning abusive state actions. *See* PATRICIA ALLAN LUCIE, FREEDOM AND FEDERALISM: CONGRESS AND THE COURTS 1861-1866, at 166 (1986).

Congress too was well aware of prosecutors' systematic abuse of the judicial process. During the debates on the 1866 amendments to the Habeas Corpus Suspension Act, Senator Trumbull, Chairman of the Judiciary Committee, urged action because "several thousand . . . loyal men" were being subjected to baseless civil and criminal prosecutions. *See* CONG. GLOBE, 39th Cong., 1st Sess. 1983 (1866) (remarks of Sen. Trumbull).[2] Senator Trumbull was not alone. As Congress debated the Civil Rights Act of 1866, legislators expressed concern about the vexatious use of prosecutions against Union supporters and federal officials. *See id.* at 2065 (remarks of Sen. Doolittle) (describing the widespread nature of the problem of unfounded prosecutions against federal officials); *see also* Achtenberg, *supra*, at 338-42 ("For the 39th Congress, the problem of baseless prosecutions. . . . was a pressing current crisis that provoked vigorous debate and decisive legislative action."). In recommending the

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[2] Senator Trumbull knew the common law of his time, including that prosecutors could be held liable for their actions in tort. During his service as a Justice of the Illinois Supreme Court, he wrote an opinion holding that "the law secures every person from unfounded arrests, maliciously instituted against him without probable cause." *Jacks v. Stimpson*, 13 Ill. 701, 704 (Ill. 1852).

passage of the Fourteenth Amendment, the Joint Committee on Reconstruction stated:

> Southern men who adhered to the Union are bitterly hated and relentlessly persecuted. In some localities prosecutions have been instituted in State courts against Union officers for acts done in the line of official duty, and similar prosecutions are threatened elsewhere as soon as the United States troops are removed. All such demonstrations [of hostility to the Union] show a state of feeling against which it is unmistakably necessary to guard.

REPORT OF THE JOINT COMMITTEE ON RECONSTRUCTION, 39th Cong., 1st Sess. XVII-XVIII (1866). Cognizant of these state abuses, the Reconstruction Congress sought a way to hold errant state officials accountable.

B. Because of continuing abuses, the 42nd Congress enacted § 1983

In April 1866, Congress passed the Civil Rights Act, which provided for criminal penalties against any person who caused the deprivation of the rights of former slaves. Ch. 31, 14 Stat. 27 § 2 (1866). But the violence continued unabated. *See* FONER, *supra*, at 342 (quoting the former Governor of Louisiana as complaining in October 1866 that "murder and intimidation are the order of the day in this state"). Resistance to national authority was flagrant in much of the South. Otherwise "respectable" Southerners – including

lawyers and state officials – openly or tacitly directed, participated in or condoned the Ku Klux Klan's campaign of terror. *Id.* at 432-34.

In 1871, Congress reacted. Buttressed by the constitutional authority of the Fourteenth Amendment, it expanded the scope of the 1866 Act by adding a civil liability provision pursuant to the Ku Klux Klan Act of 1871, ch. 22, 17 Stat. 13 § 1 (1871). That law, now codified at 42 U.S.C. § 1983, prohibited any person from depriving any citizen or other person of the rights, privileges and immunities secured by the Constitution.[3] Section 1983 was modeled on § 2 of the 1866 Act. *See Briscoe v. LaHue*, 460 U.S. 325, 360 (1983) (Marshall, J., dissenting) (citing the statements of Rep. Shellabarger and Sen. Edmunds).

Section 1983 was far less controversial than the other sections of the 1871 Act (which, as noted, authorized federal military incursions and the suspension of habeas corpus). Thus, this new regime of civil liability met with essentially no opposition. *See* CONG. GLOBE, 42d Cong., 1st Sess. App. 310 (remarks of Rep. Maynard) ("Pray, tell me who objects to [§ 1]? I suppose there is not much objection to it, from the fact that so far there has been very little said about it."); CONG. GLOBE, 42d Cong., 1st Sess. 568 (remarks of

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[3] The 1871 Act also included criminal penalties for conspiring to violate civil rights, *id.* at § 2, authorized the President to send military forces to suppress violence aimed at depriving civil rights, *id.* at § 3, and authorized the suspension of habeas corpus for a limited time. *Id.* at § 4.

Sen. Edmunds) ("The first section is one that I believe nobody objects to . . . "); *id.* at 482 (remarks of Rep. Wilson) (observing that objections to the bill were primarily aimed at §§ 3 and 4, rather than §§ 1 and 2).

But § 1 was debated, and the discussion makes clear that it was viewed as an important part of the remedial package, to be construed broadly to achieve its important remedial purpose. Thus, Representative Shellabarger declared:

> This act is remedial, and in aid of the preservation of human liberty and human rights. All statutes and constitutional provisions authorizing such statutes are liberally and beneficently construed . . . the largest latitude consistent with the words employed is uniformly given in construing such statutes and constitutional provisions as are meant to protect and defend and give remedies for their wrongs to all the people.

CONG. GLOBE, 42d Cong., 1st Sess. App. 68 (1871); *see also id.* at 217 (1871) (remarks of Sen. Thurman) (expressing his opposition by remarking that "there is no limitation whatsoever upon the terms that are employed [in § 1983], and they are as comprehensive as can be used"); CONG. GLOBE, 42d Cong., 1st Sess. 800 (remarks of Rep. Perry) ("Now, by our action on this bill we have asserted as fully as we can assert the mischief intended to be remedied.").

It bears remembering today that the Congress that framed § 1983 intended to create a potent new

tool for innocent victims to obtain redress from state actors who trammeled their constitutional rights. *See id.* at 476 (remarks of Rep. Dawes) (The person who "invades, trenches upon, or impairs one iota or title of the least of [constitutional rights], to that extent trenches upon the Constitution and laws of the United States, and this Constitution authorizes us to bring him before the courts to answer therefor").

II. GIVEN THE LEGISLATIVE INTENT, THE COURT SHOULD NOT EXPAND THE REACH OF ABSOLUTE IMMUNITY DEFENSES IN § 1983 ACTIONS

As the Court has acknowledged, nothing in the text of § 1983 suggests that any class of persons or category of conduct would be immune from liability. *Imbler*, 424 U.S. at 417 (§ 1983 "creates a species of tort liability that, on its face, admits of no immunities"); *Kalina v. Fletcher*, 522 U.S. 118, 123 (1997) ("The text of the statute purports to create a damages remedy against every state official for the violation of any person's federal constitutional or statutory rights.").[4] Moreover, amici have not found a single

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[4] The statute provides, "*Every person* who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, *shall be liable* to the party injured in an action at law, suit in

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comment in the legislative history of the 42nd Congress that evinces the intention to create such immunity from liability.

In fact, the legislative history suggests that Congress did *not* intend to incorporate common law immunities. For example, Democratic Senator Thurman of Ohio argued against the Act that it would override the immunity of state legislators, and he challenged the bill's Senate manager, Senator George Edmunds, to deny it:

> Now, I put it to the member of the committee who has this bill in charge [Senator Edmunds], does [§ 1] include the legislators of a State?. . . . It is a deprivation under color of law, a deprivation which some one shall inflict or cause to be inflicted upon some other; and now if the legislators of a State pass a law which, in the judgment of some person, deprives him of some right, privilege, or immunity, and a district judge of the United States should be of the same opinion, I put it to the Senator, where is the clause that exempts those legislators from the action that is provided in this section of the bill? I do not know what answer can be given to this. They pass the law, and they are therefore the very persons who do cause the man to be deprived of what is held to be his privilege.

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equity, or other proper proceeding for redress. . . ." 42 U.S.C. § 1983 (emphasis added).

CONG. GLOBE, 42d Cong., 1st Sess. App. 217 (1871). The next day, although Senator Edmunds responded to several of Senator Thurman's arguments, neither he nor any other supporter of the Act addressed this issue. CONG. GLOBE, 42d Cong., 1st Sess. 691-702. Indeed, President Johnson had vetoed the 1866 Act based on his concern that it would abrogate common law immunities.[5]

As Justice Marshall demonstrated in his scholarly dissenting opinion in *Briscoe*, the legislative history of § 2 of the 1866 Act, President Johnson's veto message, and Congress's decisive overriding of that veto, all made clear that the civil rights laws were not intended to immunize state judges or officials, but were instead deliberately *aimed* at the conduct of such officials. *Briscoe v. LaHue*, 460 U.S. 325, 358-61 (1983). *See also* CONG. GLOBE, 39th Cong., 1st Sess. 1758 (1866) (remarks of Sen. Trumbull) ("The assumption that State judges and other officials are not to be held responsible for violations of United States laws . . . places officials above the law. . . . The

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[5] *See* CONG. GLOBE, 39th Cong., 1st Sess. 1680 (1866) (President's Message to Congress) (stating that the bill "invades the judicial power of the State" because "State judges, in execution of their judgments, could be brought before other tribunals and there subjected to fine and imprisonment"). Congress quickly overrode the President's veto due to the overwhelming support for the Act, making 1866 "the first time in American history, [that] Congress enacted a major piece of legislation over a President's veto." *See* FONER, *supra*, at 251.

right to punish persons who violate the laws of the United States cannot be questioned.").

Despite this history, the Court has held that Congress would not have intended to abrogate settled common law tort immunities without doing so expressly. *See, e.g., Tenney*, 341 U.S. at 376; *Pierson v. Ray*, 386 U.S. 547, 554-55 (1967); *Briscoe*, 460 U.S. at 339. Yet the Court consistently has required that defendants shoulder the heavy burden of demonstrating that absolute immunity is justified by the historical common law. If that burden is not met, "the defendant simply loses." *Buckley v. Fitzsimmons*, 509 U.S. 259, 281 (1993) (Scalia, J., concurring).

Amici are sensitive to the policies behind *stare decisis* and do not urge that *Imbler* be overturned. But given the history of Reconstruction and the express intentions of Republican congressional leaders in the 39th and 42nd Congresses, amici believe that the Court should exercise significant restraint in extending absolute immunity for officials in actions brought under § 1983. Without evidence of a firmly established common law tradition according absolute immunity, there should be no such extension. We turn now to the history of the relevant common law immunities as of 1871.

III. UNDER THE 1871 COMMON LAW, PROSECUTORS DID NOT ENJOY ABSOLUTE IMMUNITY

Everyone agrees that when the Court weighs whether to recognize absolute immunity for official misconduct that allegedly gives rise to a § 1983 action, it must be guided by the intent and understanding of Congress in 1871. The 42nd Congress would not have contemplated absolute prosecutorial immunity because the common law did not accept that doctrine until 1896, twenty-five years after the adoption of § 1983. Moreover, none of the absolute immunities that did exist in the common law in 1871 would have applied to Petitioners' conduct.

A. Even if Congress intended to preserve certain immunities, only immunities firmly established in 1871 can be incorporated into § 1983

As the Court has interpreted it, § 1983 incorporates common law immunities that were well established at the time of its enactment in 1871. *See Tenney*, 341 U.S. at 376. The existence at common law of the particular immunity for the function at issue is the *sine qua non* for recognizing such immunity under § 1983. The Court simply does "not have a license to establish immunities from § 1983 in the interests of what we judge to be sound public policy." *Tower v. Glover*, 467 U.S. 914, 922-23 (1984); *see also Malley v. Briggs*, 475 U.S. 335, 342 (1986) (the Court's "role is to interpret the intent of Congress in enacting § 1983,

not to make a freewheeling policy choice"); *Burns v. Reed*, 500 U.S. 478, 497 (1991) (Scalia, J., concurring in part and dissenting in part) ("[T]he presumed legislative intent not to eliminate traditional immunities is our only justification for limiting the categorical language of the statute."). In determining whether absolute immunity applies, the Court "examine[s] the nature of the functions with which a particular official or class of officials has been lawfully entrusted." *Forrester v. White*, 484 U.S. 219, 223-24 (1988).

Over the years, the Court has considered whether the Reconstruction Congress intended to retain various absolute immunities for suits brought under § 1983. In *Tenney*, the Court held that because absolute immunity for legislative functions had been established at common law long before 1871 – indeed, the concept is enshrined in the Speech and Debate Clause of the Constitution – Congress must have intended to preserve such immunity from liability for claims under § 1983. 341 U.S. at 376. In *Pierson*, the Court upheld the absolute immunity defense for judicial conduct because, in the Court's view, "[f]ew doctrines were more solidly established at common law than the immunity of judges from liability for damages for acts committed within their judicial jurisdiction . . . even when the judge is accused of acting maliciously and corruptly." 386 U.S. at 553-54.[6]

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[6] The question of the scope of absolute judicial immunity is subject to scholarly debate. *See* Margaret Z. Johns, *A Black Robe*

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In *Briscoe*, a police officer claimed he was absolutely immune from suit under § 1983 because plaintiff's allegation was based on the officer's in-court testimony. 460 U.S. at 328. Because, as of 1871, a defendant in a defamation suit at common law had absolute immunity for even defamatory statements made in the context of judicial proceedings, the Court held that such immunity was incorporated into § 1983. *Id.* at 340-41.[7]

In short, the Court consistently has insisted on historical support for absolute immunity defenses. As Justice Scalia explained, "While we have not thought a common-law tradition (as of 1871) to be a *sufficient* condition for absolute immunity under § 1983, . . . we have thought it to be a *necessary* one." *Burns*, 500 U.S. at 497 (Scalia, J., concurring in part and dissenting in part) (emphasis in original).

B. Absolute prosecutorial immunity did not exist in 1871

In the first § 1983 case to recognize absolute prosecutorial immunity, the Court explained that the

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Is Not a Big Tent: The Improper Expansion of Absolute Judicial Immunity to Non-Judges in Civil-Rights Cases, 59 SMU L. REV. 265, 271 n.42 (2006).

[7] *But see Briscoe*, 460 U.S. at 346-64 (Marshall, J., dissenting) (making well-supported argument that the legislative history demonstrated that Congress did not intend to provide immunity for defendants alleged to have violated plaintiff's constitutional rights *via* false testimony).

only warrant for reading immunities into the text of § 1983 is a finding that "the Reconstruction Congress had intended to restrict the availability in § 1983 suits of those immunities which historically, and for reasons of public policy, had been accorded to various categories of officials." *Imbler*, 424 U.S. at 417-18. The relevant history, therefore, concerned the common law of tort immunity that existed as of 1871 – the only history the 42nd Congress could have known when it enacted § 1983. The Court announced the right rule, but then proceeded to ignore it.

Justice Powell acknowledged that the "first American case to address the question" of a prosecutor's absolute immunity from suit for malicious prosecution was decided in 1896. *Id.* at 421 (citing *Griffith v. Slinkard*, 44 N.E. 1001 (Ind. 1896)). The Court, however, glided over the fact that this "first" case was decided twenty-five years after § 1983 was adopted and therefore could not have reflected the common law as the 42nd Congress understood it in 1871. But the timing is critical when the issue is whether the common law was settled at a particular moment in history.

There was nothing close to a settled tradition of absolute prosecutorial immunity at any time in the nineteenth century. Even after *Griffith*, the common law in this area was not settled until the mid-1920s – fifty years after the adoption of § 1983. For example, while Indiana adopted the doctrine in 1896, the very next year Kentucky concluded that prosecutors could be liable if they acted with malice or corrupt motives.

Arnold v. Hubble, 38 S.W. 1041 (Ky. Ct. App. 1897). This split in authority persisted into the 1920s. *See* Douglas J. McNamara, *Buckley, Imbler and Stare Decisis: The Present Predicament of Prosecutorial Immunity and an End to its Absolute Means*, 59 ALB. L. REV. 1135, 1169 (1996); *see also* Note, *The Civil Liability of a District Attorney for Quasi-Judicial Acts*, 73 U. PA. L. REV. 300 (1925); Annotation, *Immunity of Prosecuting Officer from Action for Malicious Prosecution*, 34 A.L.R. 1504 (1925) (recognizing the split in authority and collecting cases). Thus, California rejected absolute prosecutorial immunity in 1908, *Carpenter v. Sibley*, 94 P. 879 (Cal. 1908), and Hawaii held that a public prosecutor could be liable for malicious prosecution and rejected the doctrine of absolute prosecutorial immunity in 1916. *Leong Yau v. Carden*, 23 Haw. 362 (Haw. Terr. 1916).[8] In the federal system, absolute prosecutorial immunity was not recognized until 1927. *Yaselli v. Goff*, 275 U.S. 503 (1927).

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[8] The Oregon Supreme Court supplies perhaps the best example of how unsettled the question of absolute immunity for prosecutors was more than fifty years after 1871. In 1924, that court, sitting en banc, refused to grant a prosecutor absolute immunity, holding that a prosecutor who intentionally falsely accused someone of a crime could be held liable in tort. *Watts v. Gerking*, 222 P. 318, 321 (Or. 1924). Months later, on reargument, a divided court reversed itself, withdrew its earlier decision, and held that the prosecutor was protected by absolute immunity for the exercise of his quasi-judicial position. 228 P. 135 (Or. 1924).

Congress cannot have intended to abrogate or retain a legal rule in 1871 that did not yet exist. *See Kalina v. Fletcher*, 522 U.S. 118, 124 n.11 (1997) (noting that *Imbler* did not cite pre-1871 cases and relied primarily on "policy considerations").

C. The absolute immunities that were firmly established in 1871 did not immunize prosecutorial functions

There were only two species of absolute immunity from tort liability recognized at common law as of 1871 that might apply to prosecutorial functions – judicial immunity and defamation immunity. *See Burns*, 500 U.S. at 499 (Scalia, J., concurring in part and dissenting in part). These immunities do not extend to Petitioners' conduct. A rule of "quasi-judicial" immunity also existed at the time, but provided only qualified immunity. Therefore, none of the immunities established in 1871 shielded prosecutorial conduct with absolute immunity.

1. Judicial immunity

In 1871, judicial immunity was absolute for all claims arising from the exercise of adjudicative functions. *Id.* It was not limited to those holding judicial office, but extended to officers in courts martial, grand and petit jurors, assessors valuing property, commissioners appraising damages, town council members allowing claims, and arbitrators. *Id.* at 499-500.

While both public officials and private citizens received protection, common law judicial immunity was limited to the core adjudicative functions of resolving disputes or authoritatively determining private rights. *Id.* at 500; *see also Forrester*, 484 U.S. at 227-28 (judicial immunity protects judging, not judges; where there is no adjudication, judicial immunity does not apply). Consistent with this focus, the Court has stressed that the purpose of judicial immunity is to protect the adjudicative function from exposure to harassing litigation by disappointed litigants who have alternative remedies through appellate review. *Forrester*, 484 U.S. at 226-27. Thus, a judge's decisions about secretarial staff are not protected by judicial immunity, *id.* at 229-30, and a judge's promulgation of rules governing professional conduct is not protected by judicial immunity because that function is considered rulemaking, not adjudication. *See Supreme Court of Virginia v. Consumers Union of United States, Inc.*, 446 U.S. 719, 731 (1980).

This functional approach has historically been followed for absolute judicial immunity. Nineteenth-century judges, like judges today, not only weighed competing claims and adjudicated disputes, but also performed ministerial functions. Whether a judge enjoyed judicial immunity depended on "whether the given act shall be considered as judicial or ministerial in character." FLOYD R. MECHEM, A TREATISE ON THE LAW OF PUBLIC OFFICES AND OFFICERS 9 (1890) (citing BOUVIER'S LAW DICTIONARY); *see also* Laura Oren, *Immunity and Accountability in Civil Rights Litigation:*

Who Should Pay?, 50 U. PITT. L. REV. 935, 949 n.54 (1989).

Under the common law as of 1871, a judge's ministerial or quasi-judicial acts received either no immunity at all or only qualified immunity. *See Pike v. Megoun*, 44 Mo. 491, 496 (Mo. 1869) ("When duties which are purely ministerial are cast upon officers whose chief functions are judicial, and the ministerial duty is violated, the officer, although for most purposes a judge, is still civilly responsible for such misconduct.") (quoting *Rochester White Lead Company v. City of Rochester*, 3 N.Y. 463, 466-67 (N.Y. 1850)). Courts reasoned that because judicial officers are granted far-reaching power to perform important ministerial functions, any knowing abuse of such power would taint the office of the judiciary. *See Briggs v. Wardwell*, 10 Mass. 356, 357 (Mass. 1813) ("[W]hen a magistrate . . . willfully abuses the power which is intrusted to him, the law will scrutinize his conduct with more severity than that of a private citizen[.]").

The common law regarding whether conduct was judicial or ministerial was in flux during this period. In 1869, the Supreme Court of Missouri found the question of whether an act is ministerial to be "of considerable embarrassment" because courts had issued "multiplied, various, and conflicting opinions" in making such determinations. *Pike*, 44 Mo. at 494; *see also Tompkins v. Sands*, 8 Wend. 462, 466 (N.Y. 1832) ("It may sometimes be difficult to determine whether an act is judicial or ministerial."). This is not

surprising, given the absence of bright-line distinctions. *See* H. GERALD CHAPIN, HANDBOOK OF THE LAW OF TORTS 152-53 (1917) ("The mere fact that the officer is called upon to exercise some judgment . . . does not change the character of his acts from ministerial to judicial[.]"); THOMAS M. COOLEY, A TREATISE ON THE LAW OF TORTS 482 (2d ed. 1888) ("[T]here are various duties lying along the borders between those of a ministerial and those of a judicial nature.").

Courts drew the line in different places. Some held that an act was "judicial" if it required the exercise of discretion by an officer invested with the power to adjudicate and issue a final decision, yet still refused to accord absolute immunity. *See First Universalist Society in Fletcher v. Leach et al.*, 35 Vt. 108 (Vt. 1862) (holding that the functions were judicial because the officials could make inquiries and consider evidence to make a final determination, but allowing only qualified immunity); *Bevard v. Hoffman*, 18 Md. 479, 484 (Md. 1862) (noting that "judges of elections" were "judicial officers" required to "exercis[e] judgment[,]" but holding that defendant judges could face both civil and criminal liability for malicious conduct). Other courts stated what seemed like a clear rule that a "judicial act" was absolutely immune while the actions of ministerial officers were fully subject to liability, *Tompkins*, 8 Wend. at 468, but then held that even where a judicial officer exercised discretion in approving an appeal bond, he was not accorded absolute immunity because his discretionary act involved "the same discretion exercised by

every ministerial officer who takes bail." *Id.* at 469; *see also Briggs v. Wardwell*, 10 Mass. 356 (Mass. 1813) (holding that magistrate's issuance of execution of judgment was ministerial because lower judicial officials could perform the same function). The common law, it is fair to say, was murky.[9]

But the line between core adjudicative conduct and tangential administrative functions was clear. Judges and other judicial officials were subject to liability for record-keeping and other managerial functions. *See Garfield v. Douglass*, 22 Ill. 100 (Ill. 1859) (stating that a judge could be liable for altering the court's docket if he acted with malice); *Disbrow v. Mills*, 62 N.Y. 604, 609 (N.Y. 1875) (surrogate "acts at his own peril" and is liable in tort if he fails to ensure that "accounts [are] kept in such manner as to show to what estates or parties the fund . . . belongs"); *Lee v. Lide*, 20 So. 410 (Ala. 1896) (upholding liability of judge for actions of court clerk who improperly collected fees from plaintiff).

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[9] As the court put it in *Shaw v. Moon*:

> The books are full of decisions relative to the civil liability of judicial officers, and the great variance in the authorities well demonstrates that the law is not an exact science. One line of cases emphasizes the necessity of maintaining, as a matter of public policy, the independence of the judiciary; while another stresses the right of personal liberty and frowns upon any attempt to interfere therewith. In our opinion the better reasoned cases seek the golden mean.

245 P. 318, 319 (Or. 1926).

One can liken some aspects of modern prosecutorial conduct to the judicial functions protected under the common law as of 1871. Therefore, under the Court's functional approach, to the extent a prosecutor's conduct is adjudicative, it conceivably could qualify for protection under the aegis of absolute judicial immunity. But this rarely will be the case. Prosecutors *advocate*; they rarely can be said to *adjudicate*. Thus, though the Court in *Imbler* mentioned judicial immunity, it invoked only the general policies supporting the doctrine. *See Imbler*, 424 U.S. at 422-23 n.20 (discussing policy reasons for judicial and grand juror immunity). It did not attempt to show (and we do not believe that it could have been shown) that the prosecutorial conduct at issue in that case – the offering of false testimony and the suppression of exculpatory evidence – was sufficiently adjudicative to qualify for absolute judicial immunity.

The conduct here was ministerial, not adjudicative. Nothing about Petitioners' failure to implement a policy to require dissemination of information regarding the identity of jailhouse informants to all line prosecutors involved "resolving disputes between parties, or . . . authoritatively adjudicating private rights." *Burns*, 500 U.S. at 500 (Scalia, J., concurring in part and dissenting in part). Therefore, the pre-1871 common law tradition of judicial immunity provides no basis for shielding Petitioners with absolute immunity today.

2. Defamation immunity

The Court has occasionally looked to the "defamation immunity" that existed at common law prior to 1871 for justification for upholding a defense of absolute immunity to a claim under § 1983 for defamatory in-court statements. *See Briscoe*, 460 U.S. at 330-31; *Burns*, 500 U.S. at 489-90. Both Justice Marshall, who dissented in *Briscoe*, and Justice Scalia, who dissented in part in *Burns*, appear to have accepted that false in-court statements by prosecutors bear sufficient resemblance to the conduct that received defamation immunity to be covered. *Briscoe*, 460 U.S. at 350 (Marshall, J., dissenting); *Burns*, 500 U.S. at 496-97 (Scalia, J., concurring in part and dissenting in part).

Even assuming "defamation immunity" can apply in something other than a defamation case, however, the conduct at issue here did not involve false statements made in court, but the out-of-court decision not to adopt an administrative policy to collect and distribute information about the use of and consideration provided to informants. Defamation immunity would not have been applied to this function because it is so far removed from in-court advocacy. Accordingly, there is no basis to uphold absolute immunity for Petitioners under this doctrine.

3. Quasi-judicial immunity

That leaves a third, and final, pre-1871 common law immunity that might be said to apply here. This "quasi-judicial" immunity was an outgrowth of the judicial immunity discussed above.[10] It protected government servants for official acts that required the exercise of policy discretion, but not the adjudication of disputes. *Burns*, 500 U.S. at 500 (Scalia, J., concurring in part and dissenting in part). It applied where the law "commits to any officer the duty of looking into facts, and acting upon them, not in any way which it specifically directs, but after a discretion in its nature judicial." JOEL PRENTISS BISHOP, COMMENTARIES ON THE NON-CONTRACT LAW 365-66 (1889). For example, quasi-judicial immunity protected a tax assessor determining liability, *see id.* at 366; a school board expelling a student, *id.*; a town board of equalization determining land value, *see Steele v. Dunham*, 26 Wis. 393 (Wis. 1870); a court clerk accepting an insufficient bond on appeal, *see Billings v. Lafferty*, 31 Ill. 318, 322 (Ill. 1863); and a surveyor-general revoking the commission of a deputy surveyor, *see Reed v. Conway*, 20 Mo. 22, 44-52 (Mo. 1854).

Quasi-judicial immunity is a good fit for contemporary prosecutors because they investigate facts and exercise vast policy discretion but do not finally adjudicate disputes. But this common law immunity

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[10] *See supra* pp. 25-27 (discussing cases declining to grant absolute immunity to quasi-judicial persons or conduct).

was not absolute; it was qualified in that it could be overcome by a showing of malice. *See Burns*, 500 U.S. at 500 (Scalia, J., concurring in part and dissenting in part); Note, *Immunity of Quasi-Judicial Persons from Suits for Malicious Acts*, 3 MINN. L. REV. 515, 517 (1919).

IV. AS OF 1871, THE COMMON LAW GRANTED ONLY QUALIFIED IMMUNITY TO PROSECUTORS ALLEGED TO HAVE ABUSED THE JUDICIAL PROCESS

In 1871, prosecutors were not accorded the protection of absolute immunity; instead, they were liable for the tort of malicious prosecution if they unsuccessfully prosecuted a defendant with malice and without probable cause. Although the office of public prosecutor was not widely established before 1871,[11] it was common then (as now) for courts to

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[11] Prior to 1871, a system of private prosecution flourished because public prosecutors lacked the resources to prosecute crime effectively. *See* Robert M. Ireland, *Privately Funded Prosecution of Crime in the Nineteenth-Century United States*, 39 AM. J. LEG. HIST. 43, 43-46 (1995) (describing "deficiencies" including a lack of qualified attorneys, poor funding, and the inability to travel throughout a prosecutor's assigned territory). Victims, unable to rely on the government, continued to use the English common law system of hiring private counsel to seek justice for both criminal and civil misconduct. *See* Margaret Z. Johns, *Reconsidering Absolute Prosecutorial Immunity*, 2005 BYU L. REV. 53, 108-15 (2005). While the public-private distinction might suggest different policy arguments, it is of limited relevance here because it is the function – not the title of the

(Continued on following page)

uphold liability against laypersons for the commencement of malicious prosecutions.[12] Private attorneys who prosecuted such claims were also subject to liability.[13] Most pertinent here, the tort of

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person who performs it – that matters for purposes of the absolute immunity analysis. *See Forrester*, 484 U.S. at 224 (holding that courts should examine the nature of the function for which immunity is sought).

[12] *See, e.g., Randall v. Henry*, 5 Stew. & P. 367 (Ala. 1834) (upholding liability of person responsible for malicious prosecution of criminal charges); *Stone v. Stevens*, 12 Conn. 219 (Conn. 1837) (affirming the malicious prosecution conviction of a defendant who claimed plaintiff had stolen items but lacked probable cause for this allegation); *Long v. Rodgers*, 19 Ala. 321 (Ala. 1851) (upholding the conviction of defendant who alleged kidnapping despite knowing the alleged victim had gone willingly); *Vanderbilt v. Mathis*, 5 Duer 304 (N.Y. 1856) (ordering a new trial of malicious prosecution action because the jury had not been instructed that to be liable defendant must act with malice); *William M. Ross & Co. v. Innis*, 35 Ill. 487 (Ill. 1864) (upholding claim for malicious prosecution because evidence that business accused an employee of stealing even though the owners knew he was simply reimbursing himself for expenses sufficed to show malice); *Chapman v. Cawrey*, 50 Ill. 512 (Ill. 1869) (affirming malicious prosecution judgment against landlords who had accused plaintiff of breaking into an apartment he was renting from them).

[13] *See* C.G. ADDISON, THE LAW OF TORTS 260 (3d ed. 1874) ("If an attorney maliciously, and without reasonable and probable cause, knowing that his client has no just claim against the plaintiff, assists in putting the law in motion, . . . he, as well as his client who has authorized the proceeding, will be responsible in damages."); *Warfield v. Campbell*, 35 Ala. 349, 350 (Ala. 1859) ("The liability [for malicious prosecution] extends to the attorney or agent who sues out such process through malice."); *Burnap v. Marsh*, 13 Ill. 535, 538 (Ill. 1852) (explaining that prosecuting attorneys may be held liable because to hold otherwise would

(Continued on following page)

malicious prosecution was not limited to laypersons or private prosecutors; public prosecutors were also held liable for malicious conduct.[14]

Although the common law did not provide absolute immunity for persons responsible for a criminal prosecution, prosecutors were not left unprotected. There was no liability on a tort claim for malicious prosecution unless the prosecutor acted without probable cause and with malice. 1 FRANCIS HILLIARD, THE LAW OF TORTS 480-81 (1861). This high bar for liability served the policy interest of encouraging persons to act as private prosecutors to protect the community. *See* MARTIN L. NEWELL, MALICIOUS PROSECUTION 21-22 (1892); Fowler Harper, *Malicious Prosecution*, 15 TEX. L. REV. 157, 165-70 (1937); 3 WILLIAM BLACKSTONE, COMMENTARIES *126. Given the burdens of proof, an action for malicious prosecution essentially incorporated the elements of qualified

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"authoriz[e] those who are the most capable of mischief to commit the grossest wrong"); *Wood v. Weir et al.*, 44 Ky. (5 B. Mon.) 544, 547 (Ky. 1845) (explaining that attorneys acting maliciously should face liability because judges rely heavily on the integrity of attorneys, giving them great power "for good or evil," and "holding [attorneys] to a strict accountability will have the effect to exalt and dignify the profession by purging it of ignorant, meretricious and reckless members").

[14] *Parker v. Huntington*, 68 Mass. (2 Gray) 124, 127-28 (1854) (holding that where plaintiff accused the District Attorney and another defendant of lying to the court to obtain his indictment for perjury, "[t]he plaintiff can maintain his case by proof of a malicious prosecution by both or either of the defendants").

immunity. *Kalina v. Fletcher*, 522 U.S. 118, 133 (1997) (Scalia, J., concurring). If, however, the plaintiff satisfied the heavy burden of proof, the plaintiff would "ordinarily be handsomely rewarded . . . [for] the outrageous character of the defendant's conduct." Harper, *supra*, at 170.

Against this common law background of liability, the 42nd Congress would have understood that prosecutors – including those who were waging a campaign of abusive prosecutions in the South – would be held liable for unconstitutional conduct under the civil rights remedy it created with § 1983.

CONCLUSION

In the period before 1871, the Reconstruction Congress confronted organized resistance in the South to the new law of the land. Congress enacted § 1983 in order to provide a federal remedy for civil rights abuses, specifically including abusive prosecutions. This broad remedial legislation sought to impose liability – not to grant absolute immunity – for such official misconduct. Even if it could be said that Congress intended to preserve well-established immunities, no absolute immunity that existed in 1871 would apply to Petitioners' conduct. To the contrary, the common law imposed tort liability on prosecutors for malicious prosecution. Because as of 1871 there was no tradition of absolute immunity for administrative conduct like that challenged here, the

Court should refuse to grant such immunity under § 1983.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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No. 07-854

IN THE
SUPREME COURT OF THE UNITED STATES

JOHN VAN DE KAMP and CURT LIVESAY,
Petitioner,
v.
THOMAS LEE GOLDSTEIN,
Respondent.

AMICUS CURIAE BRIEF IN SUPPORT OF PETITIONERS, JOHN VAN DE KAMP AND CURT LIVESAY BY THE LOS ANGELES COUNTY DISTRICT ATTORNEY ON BEHALF OF LOS ANGELES COUNTY

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AMICUS CURIAE BRIEF IN SUPPORT OF PETITIONERS, JOHN VAN DE KAMP AND CURT LIVESAY BY THE LOS ANGELES COUNTY DISTRICT ATTORNEY ON BEHALF OF LOS ANGELES COUNTY

Amicus curiae, Steve Cooley, District Attorney for the County of Los Angeles, State of California, submits this brief for filing in support of Petitioners, pursuant to Supreme Court Rule 37.2(a) and 37.4.[1]

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1. Los Angeles County Charter section 25 (1995) states:

> Each County officer, Board or Commission shall have the powers and perform the duties now or hereafter prescribed by general law, and by this Charter, as to such officer, Board or Commission.

(Footnote omitted.) It is provided in the California general law that:

> The district attorney is the public prosecutor, except as otherwise provided by law. The public prosecutor shall attend the courts, and within his or her discretion

(continued...)

INTEREST OF AMICUS CURIAE

The Los Angeles County District Attorney's Office is the largest district attorney's office in the United States, employing over 1000 attorneys and prosecuting 60,000 felonies and 200,000 misdemeanors per year. [2] A significant number of dedicated prosecutors serve as managers and administrators responsible for training, setting policies and supervising trial attorneys and support staff. These supervisors make daily decisions affecting ongoing trials, crime charging, and case settlement. The difficulties facing talented attorneys who serve their community would be exacerbated if the attorneys were required to face the potential loss of absolute immunity.

SUMMARY OF ARGUMENT

The decision in *Goldstein v. City of Long Beach,* 481 F.3d 1170 (9th Cir. 2007) radically failed to follow precedent established by this Court. By classifying the uniquely prosecutorial functions of maintaining and disseminating information on jailhouse informants as merely administrative, the Ninth Circuit failed to understand a process that *only* has meaning in the context of preparing for trial. As such, it is clearly a prosecutorial function

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(...continued)

> shall initiate and conduct on behalf of the people all prosecutions for the public offenses.

Cal. Gov't Code § 26500 (West 1998).

[2] http://da.co.la.ca.us/oview.htm last viewed on June 25, 2008.

intimately associated with the judicial phase of the criminal process and protected by absolute immunity.

ARGUMENT

I

THE METHOD AND TIMING OF IMPLEMENTING A DATABASE OF JAILHOUSE INFORMANTS FOR DISSEMINATION TO PROSECUTORS FOR CRIME CHARGING AND TRIAL PURPOSES ARE INTIMATELY CONNECTED TO THE JUDICIAL PHASE OF THE CRIMINAL PROCESS

The Supreme Court has adopted a functional analysis in determining prosecutorial absolute immunity. A prosecutor will be absolutely immune for prosecutorial functions "intimately associated with the judicial phase of the criminal process." *Imbler v. Pachtman,* 424 U.S. 409, 430 (1976). The focus is therefore on the prosecutorial function, not prosecutorial acts or conduct, in determining the scope of immunity.

A prosecutor is absolutely immune when functioning as an advocate in respect to judicial proceedings. *Imbler v. Pachtman,* 424 U.S. at 430; *Malley v. Briggs,* 475 U.S. 335, 342 (1986); *Burns v. Reed,* 500 U.S. 478, 486 (1991); *Buckley v. Fitzsimmons,* 509 U.S. 259, 269-270 (1993). This function, while judicially related, is not limited to the courtroom setting. *Burns v. Reed,* 500 U.S. at 486; *Buckley v. Fitzsimmons,* 509 U.S. at 269-270.

The management and dissemination of potentially discoverable evidence is clearly a unique aspect of the prosecutorial function and intricately connected to the trial of cases. The *Imbler* test,

determining which prosecutorial activities are protected by absolute immunity is based on the function test. The function analysis clearly places the management of potentially discoverable material in the category of trial preparation.

In *Giglio v. U.S.*, 405 U.S. 150 (1972), this Court was presented with a promise for leniency made by one assistant U.S. Attorney where the trial prosecutor was unaware of the promise. Because of this failure to disclose information where the knowledge was imputed to everyone in the prosecutor's office, Giglio's conviction was reversed for denial of due process. This Court offered guidance and direction to large prosecutors' offices in the future to avoid the consequences of dismissal and reversal of convictions for *Brady*[3] violations of this nature.

> A promise made by one attorney must be attributed, for these purposes, to the Government. See Restatement (Second) of Agency § 272. See also American Bar Association, Project on Standards for Criminal Justice, Discovery and Procedure Before Trial § 2.1 (d). To the extent this places a burden on the large prosecution offices, *procedures and regulations can be established* to carry that burden and to insure communication of all relevant information on each case to every lawyer who deals with it.

Giglio v. U.S., 405 U.S. at 154 [Italics added.]

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[3] *Brady v. Maryland, 373 U.S. 83* (1963)

In *Goldstein*, the Ninth Circuit, with no explanation, mistakenly characterized the delay in establishing a database for dissemination of *Brady* material for deputy district attorneys preparing for trial as administrative. Counsel for Goldstein claimed that the failure to immediately implement a policy for maintaining a database, in response to *Giglio*, should result in a punitive loss of absolute immunity for the District Attorney and his chief advocate. This approach dismisses the *Imbler* function test and manifests selective amnesia for the events surrounding the jailhouse informant scandal investigated by the Los Angeles County Grand Jury in 1990. Counsel for Goldstein referred to the Los Angeles County Grand Jury report in the Appellee's Response to Amicus Briefs Supporting Certiorari filed July 27, 2007 in the Ninth Circuit at pp.11-12 and suggested that this report supported their proposition that management knew of the informant problem since 1979. In fact, the Report does discuss the failure of District Attorney Management to act in creating a database but states as follows:

"By January 1987, senior management of the Los Angeles County District Attorney's Office was cognizant of a concern within the office that a central repository of information on informants should be established." (Los Angeles County Grand Jury Report 1989-1990 (http://www.ccfaj.org/documents/reports/jailhouse/expert/1989-1990%20LA%20County%20Grand%20Jury%20Report.pdf) at p.111. Being alerted to the problem in 1987 would have been of no benefit to Mr. Goldstein who was convicted in 1980. The June 26, 1990 Report chronicled numerous deceptions and machinations by informants who deceived jurors, prosecutors and judges resulting in convictions of innocent persons. The revelations of

Leslie Vernon White, a notorious informant, in 1988 revealed lapses in security which allowed informants to obtain supposedly unreleased details of a case. These details enabled the informant to fake a credible confession, incorporating supposedly corroborating details presumably unknown to the public at large.

If *Goldstein's* flawed logic is followed, a failure to create a clearing house which caused a *Brady* violation in 1973 would have resulted in evaporation of absolute immunity in addition to reversal of the conviction. Even the language in *Giglio* advising prosecutors appeared to acknowledge the lawyer's role in "establishing procedures and regulations to insure communication of all relevant information." Determining what information is relevant is clearly an advocate's function only, not simply a bureaucratic one. The error in Goldstein's approach is even clearer when the solutions to the jailhouse informant problems enacted by the Los Angeles County District Attorney are examined. Without threat of losing absolute immunity, the Los Angeles County District Attorney did in fact create a central clearing house of jailhouse informants using modern technology[4]. The Los Angeles County jailhouse

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[4] Without fear of loss of absolute immunity, the counties responsible for the most prosecutions in California now discourage the use of jailhouse informants. According to a report by The California Commission on the Fair Administration of Justice(which includes Petitioner Van De Kamp as the Chairperson) in its 2006-2007 session

> A letter was sent to each of the fifty-eight County District Attorneys in the State, inquiring whether they had office policies

(continued...)

informant system required years of preparation, discussion with law enforcement agencies and advances in technology and has received plaudits from the defense bar.

> In Los Angeles County, the use of jailhouse informant testimony has been significantly curtailed in the past 15 years according to the county's assistant DA and Gigi Gordon, director of the Post Conviction Assistance Center in Los

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(...continued)

> governing the use of in-custody informants, and requesting a copy of that policy if it was in writing. The letter also inquired as to how many cases included testimony of in-custody informants during the past five years. We received nine responses. Four of the five largest counties had written policies similar to the Los Angeles County policy, requiring supervisory approval before the testimony of an in-custody informant could be utilized.1 None of the four smallest counties had written policies, but three indicated that supervisory approval is required.2 The Santa Clara County and Orange County District Attorneys were the only offices whose policy requires the maintenance of a central file of all informant information. The survey suggests that the use of the testimony of in-custody informants is rarely approved by any of the responding offices.

http://www.ccfaj.org/documents/reports/jailhouse/official/Official%20Report.pdf (last viewed June 23, 2008)

> Angeles. In the wake of a "devastating report" on jailhouse informants issued by the county grand jury in 1990, the Los Angeles district attorney's office adopted policies to "strictly control" the use of informant witnesses. *Now, use of informants as witnesses must be approved by a committee overseen by the chief deputy DA.* Because of these controls, jailhouse informants were used in "fewer than a dozen of the thousands of trials over the last three years." Gordon said that Los Angeles County has done "a fabulous job" of addressing the problem since it was revealed.

30 Dec Champion 52, Copyright (c) 2006 National Association of Criminal Defense Lawyers, Inc. The Champion (Italics added.)

Thus, the committee, which includes the Chief Deputy District Attorney, participates with the trial attorney in determining which informants may be relevant and trustworthy. This requires evaluation of the credibility of the informant and a comparison of the informant's purported testimony with other evidence. This is clearly a trial preparation function not administrative. Maintaining a database is also a trial preparation function requiring an experienced trial attorney's judgment as to what information is relevant and material and what is not. Recognizing that requirement, experienced trial attorneys, are the only personnel assigned to make these determinations. [5] Goldstein's March 3, 2008 Brief in

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[5] The Los Angeles County District Attorney Legal Office Policy Manual provides :

(continued...)

Opposition to the Petition for Certiorari fails to understand the complexity of trial preparation by prosecutors. Goldstein envisions the creation of a database as purely ministerial where a secretary could check off boxes, resulting in a process that is not trial preparation. (Goldstein's March 3, 2008 Brief in Opposition, p.20.) Trial preparation includes organizing large amounts of information and making the information available for trial prosecutors to present to defense attorneys, judges and juries. This is clearly *only* a trial function in the same way that preparing a graph for presentation to the jury by a prosecutor's paralegal condenses information so that it is helpful to the trier of fact. Large amounts of information must be collected, solely for the purpose of being used in trial. This can only be considered a trial function and would be protected by absolute immunity.

Moreover, establishment of a database, contrary to the Ninth Circuit's dismissive characterization of this role as purely

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(...continued)

> The Habeas Corpus Litigation Team maintains a Central Index of jailhouse informants who have offered to be, or who have been used as witnesses. The trial deputy must contact the Deputy-in-Charge of the Habeas Corpus Litigation Team (HABLIT) and determine whether the informant has offered to be a witness in the past or has testified in any prior case.
> (http://72.3.233.244/pdfs/drugpolicy/ladapolicyoninformants.pdf, last viewed June 25, 2008)

administrative, merits the judgment of experienced advocates.

Policies must continue to evolve even after the system is enacted since new case decisions and legislation may have an impact on what type of information must be maintained, how long it must be maintained and rules for dissemination. By way of example, the California State Legislature enacted Penal Code section 1127a in 1989 which specifically addressed what information needs to be collected and provided to all parties when an in custody informant is used in trial.[6] Another similar statute enacted in 1989 requires the People to notify the jailhouse

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[6] (c) When the prosecution calls an in-custody informant as a witness in any criminal trial, contemporaneous with the calling of that witness, the prosecution shall file with the court a written statement setting out any and all consideration promised to, or received by, the in-custody informant.

The statement filed with the court shall not expand or limit the defendant's right to discover information that is otherwise provided by law. The statement shall be provided to the defendant or the defendant's attorney prior to trial and the information contained in the statement shall be subject to rules of evidence.

(d) For purposes of subdivision (c), "consideration" means any plea bargain, bail consideration, reduction or modification of sentence, or any other leniency, benefit, immunity, financial assistance, reward, or amelioration of current or future conditions of incarceration in return for, or in connection with, the informant's testimony in the criminal proceeding in which the prosecutor intends to call him or her as a witness.
Cal. Penal Code § 1127a (West 2008).

informant's prior victim before being called to testify in a new trial. Cal Penal Code section 1191.25. (West 2008) It would be unrealistic to delegate to a non-lawyer the responsibility of keeping abreast of changes in the law and expect that person be capable of implementing the required modifications. Only an experienced trial prosecutor can make those assessments in what is clearly a uniquely prosecutorial function.

Some management functions are strictly bureaucratic in nature: activities that all government managers must perform, whether they are running a school district or the District Attorney's office. Management of the budget and applying for state and federal grant money are not intimately connected to the trial and prosecution of criminal cases. A large office like the Los Angeles County District Attorney's office has an entire division dedicated to such purely administrative functions.

Other policies implemented by the elected District Attorney are also not intimately associated with the judicial phase of the criminal process. The Los Angeles County District Attorney sponsors a number of community outreach and crime prevention programs which are intended to improve the community and deter people from committing crimes. This management choice is not intimately connected with the judicial phase of the criminal process.

Conversely, the core role of the District Attorney's office is filing criminal charges and determining what cases to prosecute. The decision to file a case is based on factual input derived from police reports, knowledge by the filing deputy of the

law and application of the policies of the District Attorney. For example, Los Angeles County District Attorney policy requires interviews of victims in sexual assault cases whenever feasible.[7]. This interview allows the filing deputy to assess credibility and determine the appropriate charges. This 'filing' function has been determined to be uniquely prosecutorial and thereby protected by absolute immunity, even when the filing decision has become a policy relating to an entire class of cases.

> Roe claims that even if absolute immunity exists for the typical, single-case situation in which a disgruntled victim resents the prosecutor's failure to prosecute, absolute immunity should not exist for a decision involving a whole line of cases, such as the decision made here of not prosecuting any of an officer's unwitnessed arrests.
>
> This argument is unpersuasive. In analyzing the rational underpinnings of absolute prosecutorial immunity in this context, there is "no meaningful distinction between a decision on prosecution in a single instance and decisions on prosecutions formulated as a policy for general application." *Haynesworth v. Miller*, 261 U.S. App. D.C. 66, 820 F.2d 1245, 1269 (D.C. Cir. 1987). "Both practices involve a balancing of myriad factors, including culpability, prosecutorial resources and public interests" and "both procedures culminate

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[7] (http://da.lacounty.gov/savip.htm, last viewed June 30, 2008.)

> in initiation of criminal proceedings against particular defendants, and in each it is the individual prosecution that begats the asserted deprivation of constitutional rights." *Id.*

(Roe v. City & County of San Francisco, 109 F.3d 578, 583-584 (9th Cir. 1997).

The criteria to be used in identifying an inmate as a jailhouse informant and the procedures to be followed before using that informant or adding that informant to an official database are likewise uniquely prosecutorial and are intimately related to the judicial function. As such, any decisions relating to that process are protected by absolute immunity.

II

GOLDSTEIN'S EROSION OF PROSECUTORIAL IMMUNITY CREATES NEW AVENUES FOR HARASSING LITIGATION

The Court in *Goldstein* attempted to justify its erosion of absolute immunity by relying on two cases in its flawed opinion.

A case outside of the Ninth Circuit, *Walker v. City of New York*, 974 F.2d 293 (2d Cir. 1992), was relied on by the Court in *Goldstein* for holding that there is no absolute immunity for a prosecutor's "training function". In *Walker*, the trial deputy district attorney (referred to in New York as an ADA) actually committed a crime and suborned perjury in his misconduct. Any layperson knows that this is wrong. Yet the *Walker* court opined that the District Attorney's office breached its duty to train by failing to remind lawyers to not commit crimes. *Walker* is wrongly decided and should not be

followed because of the extraordinary factual situation in *Walker*. *Walker* should be viewed as an anomaly generated out of criminal conduct by a deputy district attorney who could not be sued pursuant to 42 U.S.C.A. § 1983. The remedy in *Walker* for that particular miscarriage of justice was reversal of the charges against *Walker* and the potential of prosecuting the ADA for his criminal conduct or exposing him to professional discipline. None of these remedies require distorting absolute immunity or are limited by it.

The Court in *Goldstein* also cited *Carter* in support its position. As with *Walker*, *Carter* was an anomaly which should not be followed.

> Raymond Carter had been convicted of murder and had served ten (10) years of a life sentence without possibility of parole before his conviction was overturned and the case against him *nol prossed* following disclosures of longstanding corruption within Philadelphia's 39th Police District. n3 Carter then brought an action against the City of Philadelphia, named police officers, n4 unknown employees of the Philadelphia Police Department, and unknown policymakers within the Philadelphia DA's Office. n5
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> · · · · · · · · · · · · · · Footnotes · · · · · · · · · · ·
>
> n3 During disclosures of police misconduct uncovered during an investigation of that district, it came to light that the single eyewitness's testimony placing Carter at the murder scene · the testimony on which his conviction rested · was purchased by a

> 39th District officer, Thomas Ryan, from a prostitute-informant (Ms. Jenkins) with whom Ryan was intimate. In subsequent proceedings, Ryan was convicted of obstruction of justice and Jenkins admitted her perjured testimony. There was no forensic evidence linking Carter to the crime scene and Carter maintains his innocence.

Carter v. City of Phil., 181 F.3d 339, 342-343 (3d Cir. 1999).

As *Walker* was the result of an ADA committing a crime, *Carter* was the tragic result of a police officer committing a crime and being punished for it but the *Carter* Court targeted others to be punished also.

> Carter's action against individuals in the DA's Office was premised on their failure as administrators to establish training, supervision and discipline policies which would have (a) prevented or discouraged Philadelphia police officers from procuring perjurious "eyewitnesses" and (b) alerted assistant district attorneys to the falsity of such information and prevented its introduction as evidence.n6 The District Court dismissed all claims against the DA's Office, pursuant to Fed. R. Civ. P. 12(b)(6) concluding that those defendants were "state officials" and therefore immune from suit for acts in their professional capacity by virtue of the Eleventh Amendment. n7 It further concluded that Carter had failed to state a

> cause of action against those defendants in their personal capacities.

Carter, 181 F.3d at 343.

Carter represents ignorance of the limits of training. Reminding police officers not to have illicit relationships with prostitutes or suborn perjury would only insult the honest police officers and would certainly not deter those officers determined to violate moral standards and the law. No filing deputy has a crystal ball or the ability with enhanced training to detect an illegal sexual liaison between a police officer and a prostitute/informant. A filing deputy district attorney reads reports, occasionally interviews victims and is expected to be aware of the applicable law. Nor would a trial deputy district attorney, even after enhanced training, be likely to detect that level of deception. As in *Walker*, this case involved criminal behavior by a police officer which deprived Carter of his freedom. The *Carter* Court was eager to make everyone, even those civil servants tangentially involved, pay a price without thoughtful analysis.

The Court in *Carter* cited *Walker* with approval when it reinstated Carter's cause of action. Careful review does not support viewing those two cases as persuasive authority.

Moreover, if the decision in *Goldstein* is not corrected, a disgruntled defendant could circumvent the absolute immunity afforded to prosecutors' filing decisions by suing the District Attorney management. If the lawsuit were based on a failure to train filing deputies, the erroneous application of the function test by *Goldstein* would destroy absolute immunity for the elected District Attorney. If a filing

deputy failed to read all of the submitted police reports and erroneously filed charges against a defendant later determined to be innocent, the defendant could file a civil action against the deputy district attorney and the elected District Attorney. The filing deputy district attorney would have absolute immunity for the erroneous filing. If the defendant alleged that the elected district attorney failed to train the filing deputies properly, the elected District Attorney would not have absolute immunity under *Goldstein*. Failure to train would be the basis for the cause of action and based on *Goldstein*, absolute immunity would have evaporated. *Goldstein* opens the door to a plethora of vindictive lawsuits against past and current elected District Attorneys on amorphous "failure to train" causes of action. Large urban District Attorney offices, like Los Angeles, have a training division which is primarily responsible for training new prosecutors and ongoing training of experienced prosecutors. Training Divisions are staffed by career prosecutors working to enhance professionalism among prosecutors. Trial deputies often receive legal or tactical advice from senior trial deputies without a foreboding sense of potential litigation and loss of absolute immunity. Defense attorneys have begun modifying their discovery requests to include lists of prosecutors tangentially involved in prosecutions.[8] Hanging this proverbial sword of

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[8] While the evidence for this new practice is only anecdotal since *Goldstein*, discovery of all deputies who discussed a pending case has been attempted in recusal motions seeking to disqualify large offices based on legal advice given by fellow prosecutors.

> Second, since the supervisors of the Compton District Attorney's office[] were involved in the prosecution's case against Humberto [S.] and sanctioned the third-party

(continued...)

Damocles over administrators and training staff would result in the unintended consequence of limiting or eliminating training programs. Qualified staff would decline assignments to train or supervise out of fear. The potential for harassing litigation would have a chilling effect on vigorous proactive training divisions.

Management's dissemination of information to filing deputies regarding a police officer's credibility as in *Roe* is exactly the same function as dissemination of information to filing deputies of potential concerns about a jailhouse informant. The Ninth Circuit found the first example of dissemination of information to be uniquely prosecutorial in *Roe* but not uniquely prosecutorial in *Goldstein*. The process in either situation is intimately connected with the judicial function of the prosecutor and cannot be arbitrarily distinguished.

(...continued)

representation it is likely that the conflict has spread to other deputy district attorneys." On that basis, it also recused "the supervising deputy district attorneys involved in the [Humberto S.] matter ... along with anyone who has discussed the case, as well as the attorneys that the supervisors direct or directed, evaluate and promote because they are subject to the same consideration[s] barring the supervising attorneys." The effect of these rulings was to recuse the assigned trial prosecutor, Timothy Hu, and an indeterminate but potentially significant number of additional attorneys. However, the trial court denied Humberto S.'s request that the entire district attorney's office be recused, concluding such wholesale recusal had not been shown to be necessary. *People v. Superior Court (Humberto S.)*, 43 Cal. 4th 737 ,745 (2008)[It should be noted that the California Supreme Court determined recusal was not appropriate in this case.]

If the trial deputy in *Goldstein* had failed to disclose the exculpatory evidence, he could not have been sued since he would have been entitled to absolute immunity. See *Imbler*.

CONCLUSION

Reversing the clearly erroneous decision will once again reaffirm the *Imbler* function test and find that litigants cannot embroil prosecutors in complex litigation simply by casting their pleadings as "failing to supervise or failing to train."

Respectfully submitted,

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AMICUS CURIAE BRIEF

18

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No. 07-854

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IN THE

Supreme Court of the United States

JOHN VAN DE KAMP AND CURT LIVESAY,
Petitioners,

v.

THOMAS LEE GOLDSTEIN,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE NATIONAL ASSOCIATION OF COUNTIES, NATIONAL LEAGUE OF CITIES, COUNCIL OF STATE GOVERNMENTS, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION, AND U.S. CONFERENCE OF MAYORS AS *AMICI CURIAE* SUPPORTING PETITIONERS

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QUESTION PRESENTED

Whether respondent can subject the former District Attorney and former Chief Deputy District Attorney of Los Angeles County to discovery and trial under §1983 for allegedly failing to implement, in 1979, a data management system for sharing information about benefits received by jailhouse informants and informants' history of working with law enforcement.

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INTEREST OF THE *AMICI CURIAE*

Amici are organizations whose members include state, county, and municipal governments and officials throughout the United States.[1] *Amici* have a compelling interest in the legal standards that govern §1983 personal-capacity actions against the directors of very large municipal agencies for mistakes allegedly committed by line employees. Unless cabined by appropriate standards, such damages actions will frequently subject senior officials to discovery and trial in violation of the longstanding rule that "a municipality cannot be held liable under § 1983 on a *respondeat superior* theory." *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 691 (1978). *Amici* accordingly submit this brief to assist the Court in its resolution of this case.

SUMMARY OF ARGUMENT

A. Contrary to the ruling of the court below, petitioners John Van de Kamp and Curt Livesay are not subject to respondent's personal-capacity damages claims. Respondent's complaint fails to satisfy the applicable pleading standard, most recently summarized by this Court in *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955 (2007). Because respondent's complaint does not support a plausible inference of unconstitutional conduct by petitioners, he should not be permitted to subject them to discovery and trial.

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[1] The parties have consented to the filing of this *amicus* brief and their consent letters have been filed with the Clerk. This brief was not authored in whole or in part by counsel for a party, and no person or entity, other than *amici* and their members, has made a monetary contribution to the preparation or submission of this brief.

A §1983 claim that supervisory officials are liable for the mistakes of their subordinates must allege that the defendants were deliberately indifferent to a serious risk that the plaintiff's constitutional rights would be deprived. *City of Canton v. Harris*, 489 U.S. 378 (1989). When pleading the claim against top-level officials of large government agencies in their personal (rather than official) capacities, the requirement that a plaintiff allege sufficient facts to plausibly suggest a right to relief is particularly important. It is very easy for plaintiffs to contrive allegations of what agency heads did not do, and similarly easy to make bare allegations of willfulness or knowledge. In order for such supervisor liability claims to reach the discovery and trial phases of litigation, these assertions must be supported by specific and non-conclusory factual allegations.

Thus, when a plaintiff bases a §1983 claim on a supervisor's failure to act, he must allege facts that plausibly suggest that the defendant actually knew of the risk that his asserted inaction would cause a deprivation of rights. Respondent has failed to do so in this case. None of the allegations in his complaint plausibly demonstrate that petitioners had personal knowledge of the "risk" at issue: that the line prosecutors who worked on his case would fail to obtain information from one another about promises made to the informant Fink, in breach of the constitutional obligations that all prosecutors have under *Brady v. Maryland*, 373 U.S. 83 (1963).

Nowhere in his complaint does respondent allege that prosecutors lacked the ability to acquire information regarding jailhouse informants, or that they were unwilling or unable to share such information with one another, much less that Van de Kamp and

Livesay were aware of such a risk. Indeed, from the face of the complaint it is highly implausible that the top two officials of the nation's largest prosecutor's office, with almost 1000 attorneys in 1979, were aware that their failure to create a database concerning jailhouse informants created or perpetuated this risk. In view of the contrived and conclusory nature of his allegations, respondent is not entitled to pursue his claims against Van de Kamp and Livesay through discovery and trial.

This conclusion is fully supported by important policy considerations. On one hand, no systemic purpose is served by allowing this case to go forward against the former District Attorney of Los Angeles County and his Chief Deputy because the County has used such a system for almost 20 years. And any viable monetary damages claims that respondent may have are appropriately litigated in an action against the two municipalities involved.

Conversely, permitting conclusory allegations of inaction to go forward against former heads of large government agencies will "dampen the ardor of all but the most resolute, or the most irresponsible [public officials], in the unflinching discharge of their duties." *Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982). As this Court has long recognized, "[c]ompetent persons could not be found to fill [senior government] positions . . . if they knew that they would be held liable for all the torts and wrongs committed by a large body of subordinates. . . ." *Robertson v. Sichel*, 127 U.S. 507, 515 (1888). The judgment of the court of appeals should accordingly be reversed.

B. The foundational element of causation is fatally absent from respondent's allegations against Van de Kamp and Livesay. To state any claim for re-

lief under §1983, a plaintiff must plausibly allege that a defendant acting under color of state law caused him to be deprived of a federal right. As this Court has instructed, "rigorous standards of culpability and causation must be applied" in order to prevent §1983 liability from "collaps[ing] into *respondeat superior* liability." *Bd. of County Comm'rs v. Brown*, 520 U.S. 397, 405, 415 (1997). Consequently, there can be no §1983 liability if the defendant's conduct was not a proximate cause of the alleged deprivation. *See Martinez v. California*, 444 U.S. 277, 285 (1980). Because respondent's wrongful conviction was allegedly caused by the failure of line prosecutors to produce impeachment evidence pursuant to their *Brady* obligations, the existence *vel non* of an information database could not have been its proximate cause.

By conceding that petitioners adequately trained prosecutors regarding their *Brady* obligations, Opp. 11, respondent effectively acknowledges that petitioners' actions or inactions regarding the creation of an indexing system could not have been the proximate cause of his asserted injury. Since *Brady* was decided in 1963, line prosecutors have had a fundamental duty to disclose to defense counsel evidence tending to negate the defendant's guilt. As this Court has repeatedly made plain, "the *individual* prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police." *Kyles v. Whitley*, 514 U.S. 419, 437 (1995) (emphasis added).

Whatever the conjectural advantages of a "database" of information about jailhouse informants, the underlying individual obligation to produce such evidence to the defense has existed in full force since

long before computers existed to facilitate efficient information storage and dissemination. Indeed, in trial practice, the duty created by *Brady* will ordinarily be fulfilled by the basic case preparation of line prosecutors.

In view of the fact that any asserted *Brady* failure in this case—which respondent concedes was not the result of lack of training on *Brady* obligations and thus was, at worst, the result of negligence by line prosecutors, Opp. 11—there is no legal basis for his claims against petitioners. Nor is this surprising: "many claims directed at prosecutors, of the sort that are based on acts not plainly covered by the conventional . . . privileges, are probably not actionable under §1983, and so may be dismissed at the pleading stage without regard to immunity." *Buckley v. Fitzsimmons*, 509 U.S. 259, 281 (1993) (Scalia, J., concurring).

Contrary to respondent's allegations and the judgment below, the Constitution did not require petitioners "to implement a data management system that would allow individuals within the District Attorney's Office . . . to share *with one another* information about benefits informants received in exchange for testifying, and informants' history of working with law enforcement." Opp. 11-12. The judgment below should accordingly be reversed.

ARGUMENT

PETITIONERS ARE NOT SUBJECT TO RESPONDENT'S §1983 PERSONAL-CAPACITY DAMAGES CLAIMS.

A. Respondent's Allegations Produce No Plausible Inference That Petitioners Were Deliberately Indifferent to His Constitutional Rights.

Under the pleading standard of *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955 (2007), respondent's Second Amended Complaint for Damages fails to support his claim that petitioners were deliberately indifferent to his constitutional rights. Because his complaint therefore does not give rise to a plausible inference of petitioners' unconstitutional conduct, he should not be permitted to subject them to discovery and trial.

Though §1983 itself imposes no blanket state-of-mind requirement, *see Parratt v. Taylor*, 451 U.S. 527, 534 (1981), a claim of supervisory liability requires a state-of-mind amounting to deliberate indifference to a serious risk that the plaintiff's constitutional rights will be deprived. *City of Canton v. Harris*, 489 U.S. 378, 389 (1989); *see Bd. of County Comm'rs v. Brown*, 520 U.S. 397, 410 (1997) (deliberate indifference is a "stringent standard of fault"). Moreover, in a personal-capacity suit,[2] "the official must both be aware of facts from which the inference could be drawn that a substantial risk of harm [to the plaintiff] exists, and he must also draw the inference." *Farmer v. Brennan*, 511 U.S. 825, 837 (1994).

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[2] In suits involving municipalities, by contrast, an objective standard for knowledge applies. *Farmer*, 511 U.S. at 840-41.

In *Bell Atlantic*, this Court summarized the standard for civil pleading under Fed. R. Civ. P. 8(a)(2). In holding that a plaintiff failed to state a claim for conspiracy under the Sherman Act, the Court articulated a "plausibility standard" requiring more than "labels and conclusions" to support allegations of actionable wrongdoing. *Id.* at 1964-66. To survive a motion to dismiss under Rule 12(b)(6), a plaintiff's "[f]actual allegations must be enough to raise a right to relief above the speculative level." *Id.* at 1965.

The requirement that a plaintiff allege sufficient facts to plausibly suggest a right to relief is particularly important when pleading a personal-capacity claim of supervisory liability for a "failure to act." Because such a claim concerns the defendant's deliberately indifferent *inaction*, it is easy for a plaintiff to contrive an allegation of what an agency head did not do. Likewise, it is easy for a plaintiff to make a bare allegation of willfulness or knowledge.[3] But in order for the case to move into discovery and trial, these assertions must be supported by specific and non-conclusory factual allegations.

Thus, when a plaintiff asserts a personal-capacity "failure to act" claim against a former agency head—where the key element of the claim is the defendant's personal knowledge, *see Farmer*, 511 U.S. at 837—a plaintiff must allege facts that plausibly suggest that the defendant *actually knew* of the

[3] Because a failure-to-act claim requires personal knowledge, the claim cannot be established by the same factual specifications that govern a negligence claim. *See Bell Atlantic*, 127 S. Ct. at 1970 n.10.

risk that his alleged inaction would cause a deprivation of rights.[4]

Respondent has pleaded no specific facts that plausibly demonstrate petitioners' personal knowledge, prior to his trial, of the risk at issue: *i.e.*, that the line prosecutors who worked on his case were unable to obtain information from one another regarding promises made to the informant Fink—in breach of the *Brady* obligations which respondent concedes they had been trained to follow. *See* Opp. 11. Instead, respondent makes a handful of bare allegations against petitioners that are either consistent with lawful conduct[5] or too vague and conclusory to proceed to discovery and trial. *See Bell Atlantic*, 127 S. Ct. at 1965-66.

For example, respondent alleges that former District Attorney Van de Kamp and his Chief Deputy had "substantial notice that false testimony by informants had occurred repeatedly," ER 34 ¶ 92, and had "considered the creation of a system to track the benefits provided to jailhouse informants."[6] *Id.* at

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[4] As noted above, *supra* p. 2 n.2, this requirement of personal knowledge does not exist as to municipalities, two of which are defendants in the ongoing litigation of respondent's claims. *See Goldstein v. City of Long Beach & County of Los Angeles*, 2006 U.S. App. LEXIS 27481 (9th Cir. 2006).

[5] Respondent alleges that petitioners, as the District Attorney of Los Angeles County and Chief Deputy District Attorney, were "the primary policy makers who would make the administrative decisions of that office . . . . includ[ing] the training of Deputy District Attorneys throughout the office as a whole." ER 33-34 ¶ 91.

[6] The allegation that petitioners considered the creation of a system, in the absence of factual support specifying when or how petitioners considered such a system, makes it particularly difficult for petitioners to respond. *See Bell Atlantic*, 127 S. Ct.

34-35 ¶ 94. But when deciding motions to dismiss, courts are not "bound to accept as true a legal conclusion couched as a factual allegation." *Papasan v. Allain*, 478 U.S. 265, 286 (1986); *cf. Scott v. Harris*, 127 S. Ct. 1769, 1776 (2007). Likewise, as this Court explained in *Bell Atlantic*, "a formulaic recitation of the elements of a cause of action will not do." 127 S. Ct. at 1965. These boilerplate allegations, which do no more than restate the requirement that petitioners had personal knowledge of a risk, do not suffice to state an actionable §1983 claim against petitioners.

Respondent also makes allegations about petitioners that are irrelevant to his claims. For example, he alleges that "improper conduct" by office personnel had been the subject of agency investigations, ER 34 ¶ 89, and that petitioners "were aware that police officers and Deputy District Attorneys were providing case information orally and in writing to informants to make sure the informants knew the facts of the offense that a criminal defendant was charged with." *Id.* ¶ 93. These allegations of "improper conduct" are irrelevant to respondent's theory of liability because he expressly disclaims that "anyone in the prosecutor's office *intentionally* suppressed exculpatory evidence in his case[,]" or "that Petitioners created a policy directing line district at-

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at 1970 n.10 ("[T]he pleadings mentioned no specific time, place, or person involved in the alleged conspiracies."); *see also id.* at 1965 n.3 ("Rule 8(a) 'contemplate[s] the statement of circumstances, occurrences, and events in support of the claim presented'" (quoting 5 C. Wright & A. Miller, Federal Practice and Procedure § 1202, at 94, 95 (3d ed. 2004))). Furthermore, this allegation suggests, if anything, that petitioners were not deliberately indifferent to the risks of using jailhouse informants.

torneys to suppress exculpatory evidence," that "Petitioners failed to provide adequate training and supervision to line district attorneys regarding their duties to disclose exculpatory evidence." Opp. 11. Thus, even if true, respondent's allegation that petitioners were aware that some prosecutors were engaging in intentional manipulation of informant testimony is irrelevant to a showing that petitioners were aware that impeachment information regarding informants was inaccessible to prosecutors who should have been seeking it.

Similarly, respondent's allegations regarding petitioners' knowledge of the risk that jailhouse informants might provide false testimony are beside the point. *See* ER 34 ¶ 92 ("[I]n January of 1979, prior to Mr. Goldstein's trial, [petitioners] received letters from a jailhouse informant alleging that the informant and another informant provided false information in several criminal cases [and] [t]his information was never indexed or widely distributed within the . . . Office."). The relevant predicate for a deliberate-indifference claim in this case is, as noted above, that petitioners were aware of the risk that subordinates would not be able to access informant information in the absence of an information management system.

Nowhere in the complaint does respondent allege that prosecutors lacked the ability to acquire information regarding jailhouse informants, or that they were unwilling or unable to share such information with one another, much less that petitioners were aware of such a risk. It is improper to assume what the plaintiff has not alleged. *See Bell Atlantic*, 127 S. Ct. at 1969 n.8; *see also Wilson v. Schnettler*, 365 U.S. 381, 383 (1961) ("In the absence of . . . an allegation [that an arrest was made without probable

cause] the courts below could not, nor can we, assume that respondents arrested petitioner without probable cause to believe that he had committed . . . a narcotics offense."). When respondent's factual allegations are taken together, they consist of nothing more than speculation that petitioners knew that subordinates did not always share information about the benefits promised to jailhouse informants. Opp. 11.

Indeed, from the face of the complaint it is not plausible that the head officials of the largest prosecution office in the country, totaling almost 1000 deputy district attorneys, were conscious in 1979 that their inactivity regarding the creation of a database was perpetuating this risk. As respondent himself observes in the complaint, it was not until 1989 that a grand jury investigation described various abuses involving jailhouse informants. In fact, with regard to petitioners' knowledge, the report of the grand jury concludes only that "[b]y January 1987"—almost ten years after respondent's trial—"senior management of the Los Angeles County District Attorney's Office was cognizant of a concern within the office that a central repository of information on informants should be established."[7] Report of the

[7] Of course, it is not enough to suggest that petitioners should have known of an unreasonable risk that prosecutors were failing to obtain informant information. While negligence and agency principles suffice to establish a constitutional violation under *Brady*, "[a] showing of simple or even heightened negligence will not suffice" to establish supervisory liability for that violation under §1983. *Brown*, 520 U.S. at 407; *Farmer*, 511 U.S. at 835 ("[D]eliberate indifference describes a state of mind more blameworthy than negligence."); *see also Rizzo v. Goode*, 423 U.S. 362, 371, 377 (1976) (finding no §1983 liability against individual supervisory officials where subordinates deviated

1989-90 Los Angeles County Grand Jury, Investigation of the Involvement of Jail House Informants in the Criminal Justice System in Los Angeles County 111 (1990), *available at* http://www.ccfaj.org/rr-use-official.html.

Finally, policy considerations underscore the need to enable courts to dispose of patently deficient personal-capacity claims against former department heads at the earliest possible time. First, there is no need for damages actions to police the conduct at issue—the failure to create information management systems. *See Butz v. Economou*, 438 U.S. 478, 512 (1978) ("[T]he safeguards built into the judicial system tend to reduce the need for private damages actions as a means of controlling unconstitutional conduct."). This damages action, against the former head of the largest District Attorney's office in the country, is a particularly unsuitable means because Los Angeles County has used such a system for almost 20 years, ER 36-37 ¶ 101, and as respondent himself observes, presumably most prosecution offices in the country have adopted similar systems. Opp. 4; *see also* Br. *Am. Cur.* Los Angeles County 7-9 & n.5. Moreover, the high bar for holding high-ranking officials liable in their personal capacity for alleged failures has not prevented respondent from seeking damages from two large municipalities and other individual defendants.

Conversely, to allow such conclusory allegations against the former heads of large government agencies to proceed to discovery and trial will "dampen the ardor of all but the most resolute, or the most ir-

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from prescribed conduct to cause a deprivation of rights and the supervisors "played no affirmative part.").

responsible [public officials], in the unflinching discharge of their duties."[8] *Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982) (alteration in original) (internal quotation marks omitted). As this Court has long cautioned, "[c]ompetent persons could not be found to fill positions . . . if they knew they would be held liable for all the torts and wrongs committed by a large body of subordinates . . . ." *Robertson v. Sichel*, 127 U.S. 507, 515 (1888). The court below thus erred in allowing respondent's claims to go forward against petitioners and the judgment below should be reversed.

B. Petitioners' Alleged Failure to Create an Information Management System Did Not Proximately Cause Respondent To Be Deprived of Any Rights.

To state any claim for relief under §1983, a plaintiff must allege that a person acting under color of law caused him to be deprived of a federal right. There can be no liability under §1983 if a public official's conduct was not a proximate cause of the alleged deprivation. *See Martinez v. California*, 444 U.S. 277, 285 (1980); Martin A. Schwartz & John E. Kirklin, 1 Section 1983 Litigation: Claims, Defenses, and Fees § 1.4 (2d ed. 1991). Because respondent's wrongful conviction was allegedly caused by the failure of the line prosecutors to produce impeachment evidence, the existence *vel non* of an information database could not have been its proximate cause. Indeed, any causal connection between the alleged fail-

[8] The Solicitor General has recently expressed similar concerns about conclusory allegations in a *Bivens* action against a former Attorney General. *See* Petition for Certiorari, *Ashcroft v. Iqbal*, No. 07-1015, *cert. granted*, June 16, 2008.

ure of petitioners to create such a database and respondent's injury is purely speculative and cannot form the basis for liability against petitioners under any set of facts. *See Martinez*, 444 U.S. at 284-85 (dismissing a §1983 claim where the asserted injury was "too remote a consequence" of the challenged conduct).

First, because respondent concedes that petitioners adequately trained prosecutors regarding their *Brady* obligations, Opp. 11, respondent effectively concedes that petitioners' failure to disseminate impeachment information was not the proximate cause of his injury. Since *Brady v. Maryland*, 373 U.S. 83 (1963), all prosecutors have had a fundamental duty to disclose to defense counsel all evidence tending to negate the guilt of the defendant.[9] The Court elaborated the contours of this obligation in *Giglio v. United States*, where it confronted a situation, similar to this one, in which one assistant federal prosecutor promised a co-conspirator immunity from prosecution in exchange for his testimony, while the assistant who tried the defendant's case failed to disclose the promise to defense counsel. 405 U.S. 150, 152-53 (1972). For purposes of establishing a *Brady* violation, the Court held that "whether the nondisclosure was a result of negligence or design, it is the responsibility of the prosecutor." *Id.* at 154 (citing Restatement (Second) of Agency § 272).[10]

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[9] It is not a violation of *Brady* if nondisclosed evidence is not material, *see United States v. Agurs*, 427 U.S. 97 (1976), or if nondisclosed evidence is already known to defense counsel before trial and the defense fails to use it. *See, e.g., United States v. De Leo*, 422 F.2d 487 (1st Cir. 1970).

[10] *Giglio* says nothing about liability under §1983. Of course, a *Brady* violation that is imputed to the entire prosecution of-

The Court in *Giglio* thus recognized that a prosecutor's duty to obtain impeachment information known by others in the office is subsumed within the basic duty of *Brady* to disclose that information to the defense. In *Kyles v. Whitley*, the Court likewise instructed that "the *individual* prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police." 514 U.S. 419, 437 (1995) (emphasis added). As already noted, respondent does not allege that petitioners failed to adequately train subordinate prosecutors regarding these duties.[11] *See* Opp. 11 ("Mr. Goldstein did not allege . . . that the Petitioners failed to provide adequate training and supervision to line district attorneys regarding their duties to disclose exculpatory evidence.").

While *Giglio* and *Whitley* establish the basic responsibility of the individual prosecutor to obtain and disclose exculpatory evidence, this Court has never—in *Giglio* or elsewhere—mandated the creation of an information management database to effectuate *Brady* obligations. *Cf. Cafeteria Workers v. McElroy*, 367 U.S. 886, 896 (1961) ("[T]he Government has traditionally been granted the widest latitude in the 'dispatch of its own internal affairs.'"). Contrary to respondent's assertion, Opp. 4, 6; ER 34

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fice does not mean that §1983 liability is also imputed to the entire office. *See Brown*, 520 U.S. at 407; *City of Canton*, 489 U.S. at 389 n.8 ("The 'deliberate indifference' standard we adopt for § 1983 'failure to train' claims does not turn upon the degree of fault (if any) that a plaintiff must show to make out an underlying claim of a constitutional violation.").

[11] Nor has respondent alleged that "anyone in the prosecutor's office *intentionally* suppressed exculpatory evidence in his case[,]" or "that Petitioners created a policy directing line district attorneys to suppress exculpatory evidence." Opp. 11.

¶ 92, *Giglio* did not create a constitutional obligation to establish an information management system. Rather, the Court recommended in dicta that in order to alleviate burdens on large prosecution offices, "procedures and regulations *can be* established to carry that burden and to insure communication of all relevant information on each case to every lawyer who deals with it." *Giglio*, 405 U.S. at 154 (emphasis added).

Equally important, no system is required for a prosecutor to discharge their *Brady* obligations, which are compulsory. It is self-evident that every prosecutor must fulfill this obligation to obtain and disclose impeachment evidence as an integral part of representing the State in a criminal prosecution. Both before and since the advent of computer databases this responsibility has existed and been carried out in the vast majority of cases through the fundamentals of lawyering. As applied to prosecution witnesses, these fundamentals include consulting colleagues and police officers who have previously worked with the witness, reviewing all relevant files, and interviewing the witness. After all, *Brady* was decided in 1963, long before it was practical to use computerized systems to efficiently store and disseminate information.

Thus, even if the line prosecutors who handled respondent's case were ignorant of the fact that Fink was receiving benefits in exchange for his testimony, *see* AER 12-13; Opp. 5, they had an elementary "duty to learn of [this] favorable evidence" that was known to the Long Beach police and other deputy district attorneys. *Whitley*, 514 U.S. at 437; *see* ER 30, 32; Opp. 5. The prosecutors' alleged departure from such a prescribed duty cannot be replaced in the

causal chain by a hypothetical information management system that may or may not have prevented respondent's injury. For this reason, respondent's §1983 personal-capacity damages claims against petitioners, based on line prosecutors' alleged negligence, are grounded in an impermissible theory of *respondeat superior* liability and should not be allowed to proceed beyond the pleadings.

Indeed, not only was petitioners' alleged failure to create an information management system not the proximate cause of respondent's injury, it is entirely speculative whether such a system would have resulted in the disclosure of *Brady* evidence. Given that the line prosecutors who handled respondent's case were apparently unaware of Fink's history of felonies and police-informant activities, there is no reason to believe that if an information management system had existed, they would have used it to obtain background information on Fink that was readily available through simple inquiry.[12]

Respondent's §1983 claim is thus fundamentally different from the claim in *City of Canton*. In that case the Court held that there were "limited circumstances in which an allegation of a 'failure to train'" could be the basis for §1983 liability. *City of Canton*, 489 U.S. at 387. But the failure alleged in *City of Canton* was the failure of the city to train its employees to provide medical care to persons in custody, and the injury from the lack of medical care was directly traceable to inadequate training. *See id.* at 385 ("[O]ur first inquiry . . . is the question whether there is a direct causal link between a municipal pol-

[12] Respondent makes no allegation that prosecutors in the Los Angeles County District Attorney's office lacked access to informant information and were unable to obtain it.

icy or custom and the alleged constitutional deprivation."). By contrast, though the injury here is the nondisclosure of *Brady* information, the alleged failure is *not* inadequate training on *Brady* obligations. *See* Opp. 11. Rather, it is the failure to create a parallel system that would allow prosecutors to obtain informant information—an ability prosecutors already had, and pursuant to a duty they were already adequately trained to follow.

The speculative nature of respondent's claim demonstrates why it is an improper basis for supervisory liability: because no system is error-free, a plaintiff can always posit that a superior system could have prevented his injury. As the *Canton* Court noted, "[i]n virtually every instance where a person has had his or her constitutional rights violated by a city employee, a §1983 plaintiff will be able to point to something the city 'could have done' to prevent the unfortunate incident." 489 U.S. at 392. Yet the essence of respondent's claim is that the Los Angeles County District Attorney's office was constitutionally required to have an information management system and that petitioners are personally liable for failing to create one. This Court, however, has squarely held to the contrary: "Due process does not require that every conceivable step be taken, at whatever cost, to eliminate the possibility of convicting an innocent person." *Patterson v. New York*, 432 U.S. 197, 208 (1977).

Contrary to the holding below, §1983 does not provide a damages remedy against high-ranking government officials for failing to take all conceivable steps to eliminate the risks of harm that attend the duties of every employee in their office. *Accord, e.g.*, *Martinez*, 444 U.S. at 284-85; *Rizzo*, 423 U.S. at 375-

76. In *Baker v. McCollan*, for example, this Court declined to hold a sheriff liable under §1983 for arresting the wrong man and holding him in custody for several days. 443 U.S. 137, 141 (1979). Though the plaintiff argued that the sheriff intentionally "fail[ed] to institute adequate identification procedures" that would have disclosed the error, *id.* at 142, the Court held that the sheriff was not "required by the Constitution to perform an error-free investigation" of every claim of innocence or mistaken identity. *Id.* at 146. Neither did the Constitution require petitioners "to implement a data management system that would allow individuals within the District Attorney's Office . . . to share *with one another* information about the benefits informants had received in exchange for testifying, and informants' history of working with law enforcement." Opp. 11-12.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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AMICUS CURIAE BRIEF

No. 07-854

Supreme Court, U.S.
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In The
Supreme Court of the United States

JOHN VAN de KAMP and CURT LIVESAY,

Petitioners,

vs.

THOMAS LEE GOLDSTEIN,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF *AMICI CURIAE* NATIONAL DISTRICT ATTORNEYS ASSOCIATION, CALIFORNIA DISTRICT ATTORNEYS ASSOCIATION, NATIONAL ASSOCIATION OF PROSECUTOR COORDINATORS, NATIONAL HISPANIC PROSECUTORS ASSOCIATION, NEVADA ADVISORY COUNCIL FOR PROSECUTORS, AND NEVADA DISTRICT ATTORNEYS ASSOCIATION IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Should top level elected and management prosecutors be held liable for failing to institute procedures relative to the collection, evaluation and dissemination of information used in criminal prosecutions?

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INTEREST OF *AMICI*[1; 2]

The National District Attorneys Association (NDAA) is the largest and primary professional association of prosecuting attorneys in the United States. The association has approximately 7,000 members, including most of the nation's local prosecutors; assistant prosecutors; investigators; victim witness advocates; and paralegals. The mission of the association is, "To be the voice of America's prosecutors and to support their efforts to protect the rights and safety of the people." NDAA provides professional guidance and support to its members, serves as a resource and education center, produces publications, and follows public policy issues involving criminal justice and law enforcement.

The California District Attorneys Association (CDAA), the statewide organization of California prosecutors, is a professional organization incorporated as a nonprofit public benefit corporation in 1974. CDAA has over 2,500 members, including elected and appointed district attorneys, the Attorney General of California, city attorneys principally

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[1] Pursuant to Rule 37.3(a), *amici* gave notice to petitioners and respondent via email on June 28, 2008 of the intention to file this *amicus curiae* brief. Petitioners and respondent have both consented to the filing of the brief.

[2] Pursuant to Rule 37.6, *amici* advise that no counsel for any party to this action authored any part of this brief, and no person other than *amici* made any monetary contribution to fund the preparation or submission of this brief.

engaged in the prosecution of criminal cases, and attorneys employed by these officials. The association presents prosecutor's views as *amicus curiae* in appellate cases when it concludes that the issues raised in such cases will significantly affect the administration of criminal justice.

The National Association of Prosecutor Coordinators (NAPC) is the only national professional association of prosecutor coordinators. It consists of 45 member states. Prosecutor Coordinators are the professional individuals in each state who serve the state prosecutors by assisting them in the administration of their offices and the pursuit of justice. Prosecutor Coordinators identify, develop and implement training and resource programs for state prosecutors and their supporting personnel. In addition, they monitor criminal law as it develops in state legislatures and alert District and State's Attorneys regarding proposed criminal justice legislation. The charter under which individual Prosecutor Coordinators operate varies according to the individual state's organization. All members have the common mission of providing the most effective professional training and resources available for prosecutors.

The National Hispanic Prosecutors Association (NHPA) was founded in 1997, is the only professional membership organization dedicated to the advancement of Hispanics as prosecutors, and is comprised of over 100 prosecutors nationwide, including both chief and line prosecutors nationwide, from all 50 states. NHPA goals include serving as a national voice for

the fair administration of justice, and providing testimony before Congress and other federal and state legislative bodies as well as national and local leadership on issues of concern to the administration of justice and the community.

The State of Nevada Advisory Council for Prosecuting Attorneys is an executive branch state agency responsible under Nevada Revised Statutes 241A.070 for providing leadership, resources and legislative advocacy on legal and public policy issues related to the duties of Nevada's prosecutors and the administration of justice. These statutory responsibilities extend to approximately 450 state and local prosecutors, including the Attorney General of Nevada, Nevada's 17 elected district attorneys, all city attorneys engaged in the prosecution of criminal cases, and all deputy attorneys employed by these officials.

The Nevada District Attorneys Association is a voluntary, unincorporated association of district attorneys that works with legislatures, courts and local policymakers to ensure that the interests of prosecutors are appropriately represented. The Nevada District Attorneys Association also works to educate prosecutors in the area of prosecutorial training and ethics.

This case raises matters of concern to prosecutors in the 9th Circuit and throughout the country. The rule enunciated by the 9th Circuit conflicts with the rulings from other Circuits, and will lead to civil litigation and potential civil liability for acts by

prosecutors that are necessarily a part of the prosecutorial function, and thus under the authority of this Court have been entitled to absolute immunity from civil liability under 42 U.S.C. § 1983. *Amici* represent the interests of prosecutors on these issues.

BACKGROUND

Respondent/plaintiff Goldstein (appellee below) filed suit in the United States District Court for the Central District of California under 42 U.S.C. § 1983 for a violation of his civil rights. He alleged that petitioners/defendants John Van de Kamp and Curt Livesay (appellants below), as the elected District Attorney and Chief Deputy District Attorney of Los Angeles County, should be held liable for failing to institute procedures to allow deputy district attorneys to access information about benefits received by "jail house informants," for failing to train deputy district attorneys to disseminate such information, for thereby creating an administrative policy and practice of encouraging the use of fabricated confessions, and for failing to install a system to disseminate to deputy district attorneys and defendants information which would impeach jail house informants.

Petitioners moved to dismiss, contending they are entitled to absolute immunity for these alleged failings, under the doctrine of prosecutorial immunity enunciated by this Court in *Imbler v. Pachtman* (1976) 424 U.S. 409. Respondent Goldstein contended

that Van de Kamp and Livesay are not entitled to absolute immunity because the challenged acts and inactions were administrative, rather than prosecutorial, in nature. The District Court agreed with Goldstein and denied the motion to dismiss. On appeal, a three-judge panel of the 9th Circuit Court of Appeals affirmed the ruling of the District Court (481 F.3d 1170). Motions for a rehearing and hearing en banc were denied.

SUMMARY OF ARGUMENT

Under longstanding authority of this Court, prosecutors are afforded absolute immunity for official actions that are intimately associated with the judicial phase of the criminal process. The respondent (plaintiff) seeks to impose liability on petitioners John Van de Kamp and Curt Livesay, top level prosecutors, based on the theory that they failed to adopt policies and procedures related to disseminating information about jailhouse informants, and about evaluating and using jailhouse informants in criminal prosecutions, thereby leading to a violation of respondent's constitutional rights when a subordinate prosecutor used a jailhouse informant to prosecute respondent. Such alleged failings on the part of petitioners, insofar as they have any constitutional and civil rights dimension, necessarily involve official actions which are intimately associated with the prosecution function in the judicial process. Lower federal courts have split on the issue of management

liability for prosecution policy decisions, but substantial authority supports the position urged by petitioners and *amici*. Contrary authority relied on by the 9th Circuit is poorly reasoned, or has underpinnings not applicable to this case. Further, the rule adopted by the 9th Circuit here would lead to incongruous results, excusing intentional violations of civil rights by some prosecutors while finding liability for unintentional violations by supervising prosecutors.

ARGUMENT

This Court has applied a functional analysis to the activities of public prosecutors in deciding whether or not absolute immunity applies to a claim under section 1983. *Imbler*, supra, 424 U.S. at 430; *Burns v. Reed* (1991) 500 U.S. 478, at 486-487; *Kalina v. Fletcher* (1997) 522 U.S. 118, at 126-127. Absolute immunity applies to a prosecutor's activities that are "intimately associated with the judicial phase of a criminal process." *Imbler*, supra, 424 U.S. at 430. Applying such a functional analysis to the alleged failings of defendants/appellants Van de Kamp and Livesay, the conclusion is inevitable that the challenged practices and policies (or lack thereof) are entitled to absolute immunity.

In summary, Goldstein's claim is that Van de Kamp and Livesay failed to adopt and enforce policies and procedures that would ensure that information about benefits to jailhouse informants (which would

reflect on the informant's credibility, and therefore would be *Brady* material) would be transmitted to all deputy district attorneys and to defense counsel. This claim is thus that Van de Kamp and Livesay committed a *Brady/Giglio* violation.

Under *Brady v. Maryland* (1963) 373 U.S. 83, the prosecution has a constitutional obligation to disclose to a criminal defendant material evidence favorable to the defendant. *Giglio v. United States* (1972) 405 U.S. 150 extended the *Brady* rule to implied promises of leniency made to informant witnesses. *Giglio* also held that when such a promise is made to the informant by one prosecutor, the fact that a subsequent prosecutor has no personal knowledge of the promise does not relieve the government of the *Brady* obligation as to that information.

> The prosecutor's office is an entity and as such it is the spokesman for the Government. A promise made by one attorney must be attributed, for these purposes, to the Government. . . . To the extent this places a burden on the large prosecution offices, procedures and regulations can be established to carry that burden and to insure communication of all relevant information on each case to every lawyer who deals with it.
>
> *Giglio*, supra, 405 U.S. at 154.

Thus, *Giglio* holds that the *Brady* obligation is not merely a personal obligation imposed on the individual prosecutor (though it is certainly that). It is also

an institutional obligation imposed on the prosecution office.

Courts have held the *Brady* obligation covers a variety of inducements to witnesses. See, e.g., *In re Jackson* (1992) 3 Cal.4th 578, 593-597 (promises made to jailhouse informants held to be covered generally by *Brady*, but not material in that case; overruled as to materiality standard in *In re Sassounian* (1995) 9 Cal.4th 535, 545, fn. 6); *United States v. Bagley* (1985) 473 U.S. 667, 676 (evidence that witnesses were paid for their testimony); *People v. Kasim* (1997) 56 Cal.App.4th 1360 (promises or inducements to a witness in prior cases). In these cases, the evidence implicates *Brady* because it may impeach the credibility of the witness.

Evidence impeaching the credibility of a witness may lead the prosecutor to decide not to rely on that witness (and thus either to prosecute the case without using the witness, or to decline prosecution of the case altogether). If the prosecutor does proceed using the witness, disclosure of the information will be required under *Brady*, and the defense may then use the impeachment evidence at trial to undermine the testimony of the witness before the jury. Under any of these situations, the prosecutor deals with the impeachment evidence in intimate association with the judicial phase of the criminal process. The decision whether or not to file the charges, the choice of and presentation of evidence on a case that has been filed, and the willful suppression of material

evidence, were all expressly held to be immune under *Imbler,* 424 U.S. at 424-431.

As noted above, Supreme Court authority holds that absolute immunity applies to a prosecutor's activities that are "intimately associated with the judicial phase of a criminal process." *Imbler*, supra, 424 U.S. at 430. In the case at bar, the alleged violation is an institutional failing of the *Brady/Giglio* obligation, with Van de Kamp and Livesay, as the head of the institution, being charged with liability. The key point is that a *Brady* violation *necessarily* occurs in intimate association with the judicial phase of the criminal process.

Brady imposes on the prosecution the "duty under the due process clause to insure that 'criminal trials are fair,'. . . ." *Weatherford v. Bursey* (1977) 429 U.S. 545, at 559. However, the obligation must be balanced against the rule that a criminal defendant has no constitutional right to general discovery in a criminal case. *Id.* Th[illegible], *Wardius v. Oregon* (1973) 412 U.S. 470, at 474, states that "the Due Process Clause has little to say regarding the amount of discovery which the parties must be afforded." Because the right is one related to criminal trials, whether a *Brady* violation exists is measured by whether "the defendant is given impeachment material, even exculpatory impeachment material, *in time for use at trial*. . . ." *United States v. Presser* (6th Cir. 1988) 844 F.2d 1275, at 1283 (emphasis added). Courts have held that disclosure of *Brady* material on the first day of trial may satisfy the due process requirement.

United States v. Wooley (9th Cir. 1993) 9 F.3d 774, at 777; *United States v. Koehler* (8th Cir. 2001) 266 F.3d 937, at 939. Likewise, this Court has held that the prosecution need not disclose impeachment evidence before a defendant enters a guilty plea, as long as all evidence of the defendant's factual innocence has been disclosed. *United States v. Ruiz* (2002) 536 U.S. 622.

When the *Brady* obligation is viewed in this light, it is obvious that any policies or procedures designed to ensure *Brady* compliance are necessarily in intimate association with the judicial phase of the criminal process, within the meaning of *Imbler*. Indeed, it is difficult to conceive how they could be otherwise. The policies, practices and training Goldstein would have Mr. Van de Kamp and Mr. Livesay put in place only have constitutional effect (and thus § 1983 effect) in the prosecution context, and indeed in the trial context.

It is established that even knowing use of false testimony at trial and suppression of exculpatory evidence represent conduct protected by absolute immunity. *Imbler*, supra, 424 U.S. at 431. Further, the 9th Circuit has held that supervising prosecutors who grant immunity to a witness in exchange for perjured testimony are protected by absolute immunity. *Genzler v. Longanbach* (9th Cir. 2005) 410 F.3d 630, at 643-644. The 9th Circuit has also stated that for absolute immunity purposes,

> . . . there is "no meaningful distinction between a decision on prosecution in a single instance and decisions on prosecutions formulated as a policy for general application." *Haynesworth v. Miller*, 261 U.S.App.D.C. 66, 820 F.2d 1245, 1269 (D.C.Cir.1987). "Both practices involve a balancing of myriad factors, including culpability, prosecutorial resources and public interests" and "both procedures culminate in initiation of criminal proceedings against particular defendants, and in each it is the individual prosecution that begets the asserted deprivation of constitutional rights." *Id.*
>
> *Roe v. City & County of San Francisco* (9th Cir. 1997) 109 F.3d 578, at 583-584.

Policies of general application regarding jailhouse informants and the dissemination of *Brady* material are subject to these same principles. Such policies will encompass identifying and balancing factors to be considered in application to the trial function of individual cases, such as:

- the relative levels of culpability of the defendant and the jailhouse informant;
- balancing the public benefit to be had in affording leniency to a criminal suspect who is also an informant weighed against the public detriment suffered from failing to hold that suspect/informant fully accountable for his crimes;

- the benefit to be gained through the testimony of the informant against another defendant;
- the nature of the benefits given to the informant and whether or not they rise to the level of materiality;
- the documentation for dissemination and discovery purposes of any material benefits conferred;
- the prosecutorial resources allocated to determining what information that cannot be classified as benefits given to the informant is nonetheless sufficiently material to warrant inclusion in such a system;
- the methods for documenting and cataloging such non-benefit information about informants (i.e. past testimony, past criminal record, etc.) which is deemed to be material;
- the prosecutorial resources allocated to creating some sort of system for recording, integrating, sharing and disseminating such information among prosecutors;
- the timing for the disclosure of such information to the defense.

These are but some of the factors that would go into the development of such policies and procedures. All of these factors are part of the balancing function prosecutors traditionally make assembling, evaluating and presenting a case in the judicial process.

They are no less prosecutorial if they are compiled and designed for general application, put onto a piece of paper and placed in a binder marked "DA Policies and Procedures" – the test is a functional one. While the policy may be general, it is felt exclusively in the trial stage of individual cases. It has no constitutional impact outside of the trial context.

Other courts have held that supervising prosecuting attorneys are entitled to absolute immunity against allegations of inadequate training or policies regarding prosecutorial activities which are subject to absolute immunity when conducted by subordinate prosecutors. *Hamilton v. Daley* (7th Cir. 1985) 777 F.2d 1207, at 1213 (holding that such claims were sufficiently meritless as to justify the awarding of attorneys fees); *Haynesworth v. Miller* (D.C. Cir. 1987) 820 F.2d 1245, at 1269 (overruled in part on other grounds in *Hartman v. Moore* (2006) 547 U.S. 250); *Boddi v. Morgenthau* (S.D.N.Y. 2004) 342 F.Supp. 193, at 205; *Pinaud v. County of Suffolk* (E.D.N.Y. 1992) 798 F.Supp. 913, rev'd in part on other grounds, 52 F.3d 1139 (2d Cir. 1995). The 9th Circuit opinion gives no consideration to these authorities, nor any explanation why the reasoning of these cases is not sound.

The 9th Circuit panel relied on two cases from other circuits which conflict with the above authorities, *Carter v. City of Philadelphia* (3d Cir. 1999) 181 F.3d 339 and *Walker v. New York* (2d Cir. 1992) 974 F.2d 293. Neither those opinions themselves, nor the 9th Circuit's reliance on them, is convincing.

Carter v. City of Philadelphia (3d Cir. 1999) 181 F.3d 339 involved a suit against both police and prosecutors for *Brady* and related violations. The prosecutors' liability in that case was based in part on the failure to institute policies that would have trained and discouraged *police* from soliciting perjured testimony. Without addressing the relationship between police and prosecutors in Philadelphia, Pennsylvania, the extension of such a rule to a California District Attorney would be wholly unwarranted.

In California, the District Attorney and the police agencies are separate and independent – neither has authority over the other. California District Attorneys are independent officials under the California Constitution, elected to the post. See generally, California Constitution, Article XI, § 1(b); California Government Code §§ 24000(a), 26500 through 26543. Police authority ordinarily resides with the Sheriff in unincorporated areas, and the city police department in incorporated cities. The Sheriff, like the District Attorney, is an independent elected county officer provided for by the California Constitution and by statute, with duties and authority separate from the District Attorney. California Constitution, Article XI, § 1(b); California Government Code §§ 26600 through 26770. Likewise, police departments, as a subdivision of a city, have their own status independent of the District Attorney. See California Constitution, Article XI, § 5(b); *Brown v. City of Berkeley* (1976) 57

Cal.App.3d 223. The police department of a city is under the control of the chief of police, not the District Attorney. See California Government Code § 38630 as to general law cities; California Constitution, Article XI, § 5(b) as to charter cities; see also *Armas v. City of Oakland* (1933) 135 Cal.App. 411.[3]

The point is that in California, the District Attorney does not have administrative authority over either the Sheriff or the police. It would be wholly inappropriate to hold Mr. Van de Kamp and Mr. Livesay responsible for not adequately training an independent police agency over which they had no administrative authority. To the extent that *Carter* is predicated on the Philadelphia District Attorney having some type of administrative authority over the Philadelphia Police Department and the Philadelphia District Attorney, the reasoning of *Carter* is thus suspect as applied to this case.[4] On the other hand, if (as in California) the Philadelphia District Attorney has no administrative authority over the police, a

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[3] In California, cities are of two types – general law cities and charter cities.

[4] This is to be distinguished from the prosecutor's involvement with the police in the investigative stage of the prosecution, which may lead to qualified immunity rather than absolute immunity (see *Burns v. Reed* (1991) 500 U.S. 478, at 492-496). But respondent Goldstein has not alleged here that Van de Kamp or Livesay participated in the investigation in such a manner that their actions entered the realm of qualified immunity.

case holding the prosecutor liable for failing to train police is wrongly decided.

Carter can also be distinguished from the instant case by its analysis of the 11th Amendment issue in that case. The *Carter* court concluded that the District Attorney in Pennsylvania was not a state official for 11th Amendment purposes, analyzing and interpreting Pennsylvania law. In California, by contrast, definitive California Supreme Court authority holds that a California District Attorney is in fact a state official, not only in prosecuting cases, but also in establishing policy and training employees. *Pitts v. County of Kern* (1998) 17 Cal.4th 340.

Walker v. New York (2d Cir. 1992) 974 F.2d 293, is also suspect as authority for liability in this case. Neither *Walker* nor the earlier Second Circuit case on which it relies, *Gentile v. County of Suffolk* (2d Cir. 1991) 926 F.2d 142 consider *Imbler* or the line of cases distinguishing prosecutorial and administrative functions. Such paltry analysis hardly provides a sound footing for the liability decision concerning prosecutorial immunity that the 9th Circuit panel made in the case at bar.

The 9th Circuit opinion also will lead to an incongruous result. Under *Imbler*, intentional violations in individual cases will be covered by absolute immunity for the individual prosecutors who deliberately intend to violate a criminal defendant's rights. However, supervising prosecutors such as Van de Kamp and Livesay, whose violation for failing to put

policies and training in place can be characterized at most as negligent or perhaps done with willful disregard, rather than being an intentional violation of an individual defendant's rights, will not be entitled to absolute immunity for their policy decisions (or indecision) regarding some perceived or alleged failure to have adequate *Brady/Giglio* procedures and training in place. Indeed, under the 9th Circuit's formulation, virtually any prosecution action by a line prosecutor which would be entitled to absolute immunity could be transformed into potential liability for supervising or managing prosecutors, based on some alleged failure to enact proper or adequate policies or procedures. Such a result would greatly undermine the wise policy enunciated by *Imbler*.

CONCLUSION

The decisions of the District Court and the 9th Circuit are not well founded, in legal reasoning or supporting authority. If the rule they enunciate remains, it will lead to excess civil litigation which second guesses District Attorneys in the policy decisions they make, and the allocation of their efforts and resources in balancing case prosecution needs.

For the foregoing reasons, *amici* respectfully request that this Court reverse the ruling of the 9th Circuit Court of Appeals.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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IN THE

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JOHN VAN DE KAMP and CURT LIVESAY,

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- against -

THOMAS LEE GOLDSTEIN,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF THE NEW YORK STATE DISTRICT ATTORNEYS ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS VAN DE KAMP AND LIVESAY

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INTEREST OF AMICUS CURIAE[1]

The New York State District Attorneys Association ("NYSDAA") is a state wide organization composed of elected county District Attorneys from throughout New York State, as well as assistant district attorneys, a membership body that is approximately 2,000 prosecutors. Members of the NYSDAA are from some of the largest prosecutor offices, i.e., New York County, which employs hundreds of prosecutors, and some of the smallest, which may have only a single prosecutor. Many of these offices are staffed, in some by a significant number, by career prosecutors who serve as supervisors responsible for office wide training, establishment of policies, and supervision of trial prosecutors.

If affirmed, the decision in *Goldstein v. City of Long Beach et al.*, 481 F.3d 1170 (9th Cir. 2007) ("*Goldstein*"), to strip supervising prosecutors of absolute immunity in a civil suit under 42 U.S.C. § 1983 (2002) ("§1983") for an alleged failure to train, set policy or supervise with regard to the disclosure obligations of a trial prosecutor under *Brady v. Maryland*, 373 U.S. 83 (1963), and *Giglio v. United States*, 405 U.S. 150 (1972) ("*Brady-Giglio*"), will negatively affect the daily work of many NYSDAA members. Many of them have prosecutorial duties that involve the supervision and implementation of

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[1] The parties have consented to the filing of this *amicus curiae* brief. Further, no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No persons or entities other than *amicus curiae* made any monetary contribution to the preparation or submission of this brief.

training and policy that directly impact past and current criminal trials and prosecutions.

SUMMARY OF ARGUMENT

The modern supervising prosecutor has many responsibilities from hiring and firing, budgeting, advising police and supervising their investigations, and directing and supervising the initiation and conduct of criminal cases in court. In *Imbler v. Pachtman*, 424 U.S. 409, 430 (1976), this Court, using a functional approach, required absolute immunity for prosecutorial advocatory conduct that is "intimately associated with the judicial phase of the criminal process . . . ."

When through training and promulgation of rules and regulations the supervising prosecutor directs the initiation and pursuit of criminal cases throughout an office, he or she is performing a role as intimately associated with the advocacy function as the conduct of the trial prosecutor directed by such rules and who, under *Imbler*, is accorded absolute immunity. Thus, this role of the supervising prosecutor is equally clothed with absolute immunity. Indeed, unless pertaining to personnel or budget, or to "investigation" or supervising one, the supervising prosecutor's role in an office is devoted exclusively to advocacy. While *Goldstein* properly recognized *Imbler's* functional approach, it completely misapplied it in concluding that the prosecutorial conduct at issue, the establishment of regulations and training for office compliance with its *Brady-Giglio* obligations in all its cases, did not possess absolute immunity from civil suit.

No prosecutorial action is more intimately related to the advocatory function and the judicial process than the fulfillment of the *Brady-Giglio* obligation by the American prosecutor. That obligation reflects the prosecutor's unique role as advocate and minister of justice, and facilitates the truth seeking role of the criminal trial. Indeed, this principle was recognized in *Giglio*, 405 U.S. at 154, where the promulgation of "procedures and regulations" was viewed as an essential precondition for a prosecutor's compliance with the disclosure obligation in court.

The compelling reasons that mandate absolute immunity for the prosecutor under *Imbler* apply with equal force to the supervising prosecutor, or chief advocate, who by training, procedures and regulations, directs advocatory conduct in hundreds, and in some offices, thousands of criminal cases annually. *Imbler's* multiple objectives--to avoid vexatious litigation, facilitate the effective performance of the prosecutor's job as advocate, encourage the disclosure of exculpatory evidence, even after conviction, and achieve the accurate judicial resolution of criminal cases at trial, on appeal, and collaterally, unaffected by the specter of civil liability on the errant prosecutor--equally justify absolute immunity for the supervising prosecutor in the performance of conduct intimately associated with the advocacy function. *See Imbler*, 424 U.S. at 425-31, and n.25 at 427.

Yet, *Goldstein* permits easy circumvention of *Imbler* by permitting defendants to attack the advocatory conduct of the trial prosecutor through pleading a §1983 suit against the supervising

prosecutor for failure to train or supervise. The negative consequences to the effective performance of the advocatory function that *Imbler* sought to prevent by barring direct suits against the trial prosecutor will be a reality if *Goldstein* remains effective precedent. Further, under *Goldstein*, the incongruous result is achieved that the supervisor in the small office who actually makes the advocatory decision (and who handles the prosecution) receives absolute immunity, while his or her counterpart in the larger office who generally through training and policy makes and directs the advocatory conduct in all cases does not. But, the intimate association between the advocacy function and the supervisor's conduct is the same in both instances.

Both sets of prosecutorial action on the supervisory and line levels, therefore, must be accorded absolute immunity from §1983 personal civil liability to preserve the continued efficacy of *Imbler*.

ARGUMENT

AS SUPERVISING PROSECUTORS, PETITIONERS VAN DE KAMP'S AND LIVESAY'S ALLEGED FAILURE TO TRAIN AND SET OFFICE-WIDE POLICY FOR PROSECUTORS TO COMPLY WITH THEIR *BRADY-GIGLIO* OBLIGATIONS IN THE INITIATION AND CONDUCT OF CRIMINAL CASES IS CONDUCT INTIMATELY RELATED TO THE PROSECUTOR'S ADVOCATORY FUNCTION. AS SUCH, PETITIONERS' ACTS ARE ENTITLED TO ABSOLUTE IMMUNITY.

a) The Functional Approach: A Prosecutor's Conduct That Is Intimately Related To The Advocacy Function Acquires Absolute Immunity.

In *Imbler*, this Court concluded that a state prosecuting attorney is absolutely immune from a civil damage suit under §1983 for acts "within the scope of his duties in initiating and pursuing a criminal prosecution." *Id.* at 410. Pachtman, a Deputy District Attorney in Los Angeles County, who had prosecuted Imbler, had allegedly failed to disclose exculpatory evidence and knowingly used false testimony at Imbler's trial. *Id.* at 412-416. Imbler, who was not retried following the vacation of his conviction, subsequently sued Pachtman in his personal capacity, as well as other law enforcement officials, under §1983 for damages stemming from the alleged misconduct. *Id.*

This Court held that Pachtman's conduct at trial was absolutely immune from civil suit as falling within the advocacy actions of a state prosecutor in initiating and conducting criminal cases, conduct that is "intimately associated with the judicial phase of the criminal process . . . ." *Id.* at 430. In effect, the state prosecutor when exercising the duties of the prosecution function is acting in a quasi-judicial capacity.

Absolute immunity was required for several excellent reasons. First, recognizing that "§ 1983 is to be read in harmony with general principles of tort immunities and defenses . . .," *id.* at 418, and "the immunity historically accorded the relevant official . . .," *id.* at 421, the Court reasoned that conferring a state prosecutor with absolute immunity for this

conduct was consistent with the historical common-law immunity afforded prosecutors against tort actions for malicious prosecution. *Id.* at 421-24.

Second, the Court concluded that "considerations of public policy . . .," *id.* at 424, compel absolute immunity. A prosecutor's potential personal civil liability to past defendants for actions performed within the scope of a prosecutor's responsibilities would inhibit the exercise of professional judgment in determining what cases to bring and how to conduct them. *Id.* at 424-25. Conferring qualified immunity would result in subjecting prosecutors to vexatious litigation from former criminal defendants, and subject "even the honest prosecutor . . .," *id.* at 425, to the danger of liability. Such litigation concerning decisions made "often years after they were made, could impose unique and intolerable burdens upon a prosecutor responsible annually for hundreds of indictments and trials." *Id.* at 425-26.

Third, absolute immunity promotes the truth seeking function of the criminal justice process in several ways. It affords the prosecution the "wide discretion in the conduct of the trial and the presentation of the evidence . . . ." *Id.* at 426. A prosecutor's professional judgment whether to use a witness should be freely exercised without fear of personal civil liability, for otherwise prosecutors would tip the balance in favor of nonuse and "triers of fact in criminal cases would often be denied relevant evidence." *Id.* Absolute immunity, furthermore, promotes the "ultimate fairness of the operation of the system itself . . .," *id.* at 427, as judges upon review of the conviction will not be "blurred by even

the subconscious knowledge that a post-trial decision in favor of the accused might result in the prosecutor's [personal liability] . . . ." *Id.*

And, pivotally, absolute immunity *facilitates*, both during a trial and after conviction, "the prosecutor's exercise of his duty to bring to the attention of the court or of proper officials all significant evidence suggestive of innocence or mitigation." *Id.* at 424 n.25. The "possibility of personal liability . . .," the Court noted, "could dampen . . ." the exercise of that prosecution duty. *Id.* In fact, the prosecutor in *Imbler* had disclosed the evidence after Imbler's conviction and after the conviction had been affirmed on direct appeal. *See id.* at 412-13.

For sound reasons, therefore, absolute immunity attaches to a prosecutor's advocatory conduct; yet the question remains how broadly does *Imbler's* sound immunity rule reach given the broad spectrum of activities covered by the modern supervising prosecutor. While *Imbler* refused to delineate the boundaries of a prosecutor's duties beyond which absolute immunity would not extend, the Court emphasized that immunity was not limited to the prosecution function performed inside the courthouse door: "We recognize that the duties of the prosecutor in his role as advocate for the State involve actions preliminary to the initiation of a prosecution and actions apart from the courtroom." *Id.* at 431 n.33.

Subsequent decisions of the Court have reaffirmed *Imbler's* functional approach, sustaining absolute immunity for a prosecutor when performing an advocatory function, but disallowing it when the

conduct is divorced from, or only tangentially linked, to that function. *See Mitchell v. Forsyth*, 472 U.S. 511 (1985) (noting Attorney General denied absolute immunity for allegedly authorizing illegal wiretapping in furtherance of national security); *Burns v. Reed*, 500 U.S. 478 (1991) (concluding absolute immunity applied to a prosecutor's conduct of a probable cause hearing but not when giving legal advice to the police prior to arrest); *Buckley v. Fitzsimmons et al.*, 509 U.S. 259 (1993) (holding absolute immunity denied to prosecutor who allegedly fabricated evidence during investigation well before grand jury and arrest, and made statements in press conference after indictment); *Kalina v. Fletcher*, 522 U.S. 118 (1997) (noting absolute immunity denied to prosecutor who acted as witness, not advocate, by certifying affidavit in support of search warrant).

Under *Imbler*, therefore, the question in *Goldstein* is whether the conduct of the supervising prosecutors is intimately related to the advocacy function, and thus, the judicial process. If the positive effects of immunity articulated in *Imbler* are not to be undone, the answer to that question is unmistakably clear: absolute immunity applies to Petitioners' advocatory conduct as supervising prosecutors. *Imbler's* functional approach dictates that a prosecutor's conduct outside the courtroom is equally advocatory when preparatory to the commencement of criminal cases and to their pursuit in the judicial process. *See Imbler*, 424 U.S. at 431 n.33.

As more fully explained in sections b. and c. below, the establishment of training and policy by supervising prosecutors concerning office

dissemination of discoverable evidence and identification and evaluation of evidence under *Brady-Giglio* is inextricably intertwined with the advocacy function performed in the commencement and pursuit of all criminal cases by a prosecutor's office.

First, it serves an exclusively advocatory purpose: for prosecutors to meet their constitutional obligations to disclose such evidence during the initiation and the conduct of criminal cases.

> Merely because a certain defendant's role was that of supervisor or trainer should not necessarily affect the immunity question. Instead, when a defendant is sought to be held liable because of his supervising/training action or inaction, we think the appropriate questions are: Supervising what? Training to do what? If the 'what' is a prosecutorial function, absolute immunity should attach.

Pitts et al. v. County of Kern, 49 Cal. App. 4th 1430, 1451 (Cal. Ct. App., 5th App. Dist. 1996) (noting DA as supervising prosecutor absolutely immune against claim of failing to supervise and train trial prosecutors who allegedly coerced witnesses to testify, suppressed evidence and failed to reveal exculpatory evidence), *rev'd on other grds*, 17 Cal. 4th 340 (1998) (explaining prosecutor is a State officer immune from suit under the Eleventh Amendment).

Second, such training and policy address issues that arise daily in the performance of the prosecutor's advocatory function, such as whether to file a charge and when, whether to use and disclose a

particular piece of evidence or witness, and compliance with discovery issues. Indeed, the supervisory training and policy constitutes a direction as to how prosecutors are to conduct their job in the courtroom. And in the smaller office, the disclosure decision itself is made by the supervisor in the particular case, a decision that *Imbler* clothes with absolute immunity. The nature of that decision does not change from advocacy simply because the office is large and the supervisor makes a more general direction that will be applied and followed in many cases. There is "no meaningful distinction between a decision on prosecution in a single instance and decisions on prosecution formulated as policies for general application." *Haynesworth v. Miller*, 820 F.2d 1245, 1269 (D.C. Cir. 1987), *overruled on other grd in Hartman v. Moore*, 547 U.S. 250 (2006). Indeed, allowing suits against prosecutors who train and supervise other prosecutors in the advocacy function makes no more sense than allowing such suits against judges who train and supervise other judges. Clearly, judicial immunity could not be overcome by filing a lawsuit against a supervising judge rather than the trial judge; nor should prosecutorial immunity. Rather, decision making by both supervisory and line personnel integral to the advocacy function are entitled to absolute immunity to preserve and foster the effective performance of the prosecutor's job, and the judicial process.

Further, *Goldstein*, if allowed to stand as precedent, permits for easy circumvention of *Imbler's* absolute immunity bar against trial prosecutors by allowing a §1983 claim under the rubric of a failure to train by the supervising prosecutor. By this

simple pleading mechanism the negative effects *Imbler* sought to avoid are back in full force in §1983 suits. The sounder principle is that trial and supervising prosecutors both possess absolute immunity for acts performed that are integral to the advocacy function. As to the supervisory conduct involved in this case, the nature of the *Brady-Giglio* obligation and its relationship to the role of the prosecutor in the criminal justice system demonstrates that the supervising prosecutor's policy and training in this area falls squarely within *Imbler*.

b) Under The Functional Approach A Supervising Prosecutor's Training And Policy Making For Office-Wide Compliance With The *Brady-Giglio* Doctrine In All Criminal Cases Initiated And Conducted By A Prosecutor's Office Is Intimately Related To The Advocacy Function And Has Absolute Immunity.

The training and promulgation of office policy by a supervising prosecutor as to how subordinate trial prosecutors are to implement their *Brady-Giglio* obligations and to disseminate discoverable evidence is a prosecution function that is inherently advocatory. The *Brady-Giglio* obligation arises, and exists, only upon the commencement and prosecution of criminal cases. Further, through training and rules and regulations, the supervising prosecutor is directing how that prosecution function will be carried out by subordinate attorneys in cases initiated and pursued by his or her office. Consequently, the supervisor's conduct is as intimately related to the prosecution function under *Imbler* as the conduct of the prosecutor-advocate who carries out that direction in a single case. The courts

of appeals have on numerous occasions determined that the supervisor is also entitled to absolute immunity for those advocatory decisions. *See Hamilton v. Daley*, 777 F.2d 1207, 1213 n.5 (7th Cir. 1985) ("Since absolute immunity protects prosecutorial decisions, supervision of the prosecutors who make these decisions is similarly immune."); *Haynesworth v. Miller*, 820 F.2d at 1268-1271 (noting supervising prosecutor's policy on the initiation of prosecutions against persons who refuse to waive civil suits for false arrests absolutely immune); *Roe v. City & County of San Francisco*, 109 F.3d 578 (9th Cir. 1997) (conferring absolute immunity for supervisor's decision not to prosecute any of an officer's unwitnessed arrests); *Modahl v. County of Kern*, No. 01-16098, 61 Fed. Appx. 394, 2003 U.S. App. LEXIS 6929 (9th Cir. 2003) (unpublished) (noting DA absolutely immune against failure to train and supervise that results in *Brady* violation and unreliable testimony of child witnesses); *Genzler v. Longanbach*, 410 F.3d 630, 644 (9th Cir. 2005), *cert. denied*, 546 U.S. 1031 (2005) (concluding absolute immunity attaches to supervising prosecutor whose conduct is intimately associated with judicial process); *But see Carter v. City of Philadelphia*, 181 F.3d 339, 356-357 (3d Cir. 1999), *cert. denied*, 528 U.S. 1005 (1999) (concluding no absolute immunity for DA supervisor's failure to set police and DA policy and training to discourage police perjury and procurement of false eyewitness testimony and to discipline offenders).

Several district courts have reached the same result. *See Stoval v. Staroff et al.*, No. 83-8066, 1984 U.S. Dist. LEXIS 22804, at *6-7 (S.D.N.Y. 1984) (noting DA absolutely immune for setting policy

governing initiation of entire class of cases); *Pinaud v. County of Suffolk*, 798 F. Supp. 913, 918 (E.D.N.Y. 1992) (concluding supervising prosecutor obtains absolute immunity against claim of failure to train prosecutors in activity latter possesses absolute immunity), *aff'd in part and rev'd in part*, 52 F.3d 1139 (2d Cir. 1995) (concluding supervisor absolutely immune except for claim he kept defendant in jail after case dismissed); *Eisenberg v. District Attorney et al.*, No. 93-1647, 1994 U.S. Dist. LEXIS 21535, at *4-7 (E.D.N.Y. 1994) (concluding that DA with respect to training and supervision on prosecution of sex crimes is absolutely immune as policies are prosecutorial in nature); *Jones v. City of Boston*, No. 03-12130, 2004 U.S. Dist. LEXIS 12628, at *10-12 (D.Mass. 2004) ("supervisor who sets general prosecutorial policies governing the actions of front-line prosecutors . . ." also gets absolute immunity), *aff'd on other grds*, 135 Fed. Appx. 439, 440, 2005 U.S. App. LEXIS 11180 (1st Cir. 2005) (unpublished); *Bodie v. Morgenthau*, 342 F.Supp.2d 193, 205 (S.D.N.Y. 2004) (same as *Jones*); *Sivadel v. City of New York*, No. 04-2113, 2004 U.S. Dist. LEXIS 15190, at *9 (S.D.N.Y. 2004) (same as *Bodie*); *Sheff v. City of New York*, No. 03-708, 2004 U.S. Dist. LEXIS 4819 (S.D.N.Y. 2004) (same as *Jones*); *Truvia v. Julien, Jr. et. al.*, No. 04-0680, 2005 U.S. Dist. LEXIS 539, at *5 (E.D.La. 2005) (concluding absolute immunity in *Brady* context), *aff'd on other grds per curiam*, 187 Fed. Appx. 346, 2006 U.S. App. LEXIS 14378 (5th Cir. 2006) (unpublished) (supervisor absolutely immune based on own acts without deciding if it attaches in role of supervisor only); *Lomtevas v. Cardozo*, No. 05-2779, 2006 U.S. Dist. LEXIS 5820 (E.D.N.Y. 2006) (same as *Jones*); *Wilson v. Barcella*, No. 05-3646,

2007 U.S. Dist. LEXIS 22934, at *82-83 (D.Texas, N.Div. 2007) (noting supervising prosecutors absolutely immune in *Brady* context); *But see McClendon v. Martin*, 37 F.Supp.2d 1371 (S.D.Ga. 1999) (concluding supervising prosecutor's failure to train prosecutors on secrecy of grand jury deliberations is administrative function), *aff'd without opinion*, 212 F.3d 599 (11th Cir. 2000); *Baloun v. Williams*, No. 00-7584, 2002 U.S. Dist. LEXIS 20663 (N.D.Ill. 2002) (same); *Kleinman v. Multnomah County*, No. 03-1723, 2004 U.S. Dist. LEXIS 21466 (D.Oregon 2004) (concluding the same as *Baloun* in context of *Brady*); *Thompson v. Connick et. al.*, No. 03-2045, 2005 U.S. Dist. LEXIS 36499, at *11-17, and n.1 at 14 (E.D. La. 2005) (concluding that generally DA supervisor's office training and supervision is administrative).

Similarly, several state courts likewise have concluded that supervising prosecutors possess absolute immunity for training and policy on advocatory conduct. *See Pitts v. County of Kern*, 49 Cal. App. 4th at 1450-1452; *Beck v. Phillips*, 685 N.W.2d 637, 644-645 (Iowa 2004).

The close link between the role of the supervising prosecutor in this area and the advocatory function was recognized in *Giglio*. There the Court observed that although the trial prosecutor's constitutional obligation to disclose impeachment material will place "a burden on the large prosecution offices, *procedures and regulations can be established to carry that burden and to insure communication of all relevant information on each case to every lawyer who deals with it.*" *Giglio*, 405 U.S. at 154 (italics supplied). Such "procedures" are

necessary because the duty to disclose extends to an entire prosecutor's office, as well as assisting police agencies; the knowledge of a single prosecutor or officer is imputed to all for the purpose of disclosure *See Kyles v. Whitley*, 514 U.S. 419, 437 (1995) ("The individual prosecutor has a duty to learn of any favorable evidence known to others acting on the government's behalf in the case, including the police."). Hence, in *Kyles*, the Court rejected the State's argument that the prosecutors were not responsible for exculpatory evidence only known to the police; and rejected the argument that imputation of such knowledge to the State prosecutors would be too burdensome, quoting *Giglio's* reference to the establishment of office "procedures and regulations" to ensure dissemination of all discoverable evidence to the appropriate prosecutor. *See Kyles*, 514 U.S. at 438 (quoting *Giglio*, 405 U.S. at 154).

Giglio, then, acknowledges that the supervising prosecutor is to serve and implement a key aspect of the prosecutor's advocacy function: to disclose exculpatory evidence in a criminal prosecution. The making of policy and training in this area exists only because of that function; and a §1983 claim predicated on a failure to train or to supervise lies only if a failure to disclose occurred at trial. The supervising prosecutor thus serves the same function as the subordinate prosecutor representing the State at trial: to determine "as an officer of the court charged to do justice . . .," *Ybarra v. Reno Thunderbird Mobile Home Village et al.*, 723 F.2d 675, 679 (9th Cir. 1984), whether disclosure should be made.

This Court's precedent interpreting *Brady-Giglio* further demonstrates the intimate relationship between the supervisor's role and the prosecutor's advocacy function. Under *Imbler*, a prosecutor's failure to disclose exculpatory evidence affects the truth-seeking function of the criminal proceeding, and as a result is prosecutorial conduct intimately associated with the judicial process. *See Imbler*, 424 U.S. at 430-431; *See also United States v. Bagley*, 473 U.S. 667, 676 (1985) ("Impeachment evidence, however, as well as exculpatory evidence, falls within the Brady rule . . . .") (citation omitted); *Kyles v. Whitley*, 514 U.S. at 433 (noting in *Bagely* "the court disavowed any difference between exculpatory and impeachment evidence for *Brady* purposes . . . ."); *Banks v. Dretke*, 540 U.S. 668, 690 n.11 (2004) (same principle).

More broadly, *Imbler* acknowledges what this Court has recognized generally about the prosecutor's *Brady-Giglio* obligation: that it derives from the prosecutor's unique function as an advocate of the State and as a minister of justice. *See, e.g., Strickler v. Greene*, 527 U.S. 263, 281 (1999) (explaining *Brady* and progeny "illustrate the special role played by the American prosecutor in the search for truth in criminal trials."); *Banks v. Dretke*, 540 U.S. at 696 ("We have several times underscored the special role played by the American prosecutor in the search for truth in criminal trials.") (citations and internal quotation marks omitted); *United States v. Agurs*, 427 U.S. 97, 111 (1976) (noting the duty of the prosecutor to disclose arises from his role to prosecute the "accused with earnestness and vigor . . .," but yet be "faithful to his client's overriding interest that justice shall be done.") (quoting from

Berger v. United States, 295 U.S. 78, 88 (1935) (internal quotation marks omitted)); *United States v. Bagley*, 473 U.S. at 678 (the inquiry for materiality to reverse a conviction for a *Brady-Giglio* violation must be guided by "our overriding concern with the justice of the finding of guilt . . . .") (internal quotation marks and citation omitted); *Giglio v. United States*, 405 U.S. at 155 (holding prosecutor's suppression of impeachment material that affects reliability of main prosecution witness violates Due Process); *Brady v. Maryland*, 373 U.S. at 88 (concluding that prosecutorial suppression of evidence requested by and favorable to the accused, "casts the prosecutor in the role of an architect of a proceeding that does not comport with standards of justice . . . ."). Thus, there is no reciprocal duty on the criminal defense attorney, who is not constitutionally obliged to disclose inculpatory evidence, as the defense attorney's responsibility, unlike the prosecutor's, is exclusively unitary—owed only to the client.

The dualistic role of the prosecutor-advocate has, in other contexts, been recognized as an essential component of a prosecutor competently and ethically performing the duties of the prosecution function in court. *See A.B.A. Standards for Criminal Justice Prosecution Function*, §3-3.11 (a)-(c) ("Disclosure of Evidence by the Prosecutor"), at 81 (3d ed. 1993) *available at* http://www.abanet.org/crimjust/standards/prosecutionfunction.pdf (June 25, 2008) ("*A.B.A Standards*"); National District Attorneys Association, *National Prosecution Standards*, §53.5 (Limits of Discoverable Information"), at 164 (2d ed. 1991) *available at* http://www.ndaa.org/pdf/ndaa_natl_prosecution_standards_2.pdf (June 25, 2008); *See also A.B.A. Model*

Rules of Professional Conduct §3.8 (d), (g) ("Special Responsibilities of a Prosecutor") (1983) *available at* http://www.abnet.org/cpr/mrpc/mrpc_toc.html (June 25, 2008).

Supervisory training and policy-setting under *Brady-Giglio* ensures that prosecutors within an office fulfill this aspect of their advocatory function ethically and competently. Such decision making also reduces the risk of infecting multiple criminal cases with errors that potentially compromise the reliability of the results. If absolute immunity is warranted for a prosecutor's conduct in a *single* case to protect the judicial process, as *Imbler* holds, then absolute immunity is justified for a supervising prosecutor's conduct that affects the initiation and conduct of *hundreds* of cases annually. In the latter case, as in the former, absolute immunity is necessary to facilitate the truth-seeking function. *See Imbler*, 424 U.S. at 430-431. It would be "incongruous" indeed for absolute immunity to shield the supervising prosecutor in the small office who makes the actual decision whether to disclose, but to deny it to the supervising prosecutor in the large office who makes the general decision by training and regulations applied and followed in many cases. In both instances, the intimate connection of the supervising prosecutor's decision making with the performance of advocacy conduct remains the same.

Thus an alleged failure to comply with *Brady-Giglio* either by the supervising prosecutor or the trial attorney implicates the prosecutor in the performance of that official's unique advocacy role. Whether occasioned by a supervising prosecutor's alleged failure to train or set office-wide policy, or by

the specific trial prosecutor's alleged conduct at trial, a §1983 civil action against the supervising prosecutor, no less than the same civil claim against the trial prosecutor, seeks personal redress for action performed within the scope of the advocacy function: A failure to disclose evidence at trial which potentially impairs the judicial process. *See Roe v. City & County of San Francisco*, 109 F.3d at 583-584 (noting no distinction between prosecution in a particular case and prosecution formulated as policy, as "both procedures culminate in initiation of criminal proceedings against particular individuals, and in each it is the individual prosecution that begats the asserted deprivation of constitutional rights.") (quoting from *Haynesworth v. Miller*, 820 F.2d at 1269) (internal quotation marks omitted).

Indeed, the supervising prosecutor's role in the promulgation of rules and regulations, and training in the area of *Brady-Giglio*, reflects the more general role the supervising prosecutor plays in supervising and directing office-wide training and policy integrally related to all advocacy conducted by an office, and to which supervisory decisions *Imbler's* absolute immunity must apply. Every day a supervising prosecutor directs subordinate attorneys in a wide range of subjects in the preparation, and in the pursuit of criminal prosecutions, i.e., what charges to file, when to immunize witnesses, how and when to make deals with witnesses, how to comply with discovery, what plea deals to offer, and in what cases, that directly impact the initiation and conduct of criminal cases. Although these advocatory activities are performed by the trial prosecutor, he or she has been directed to do so by the supervising prosecutor through training, and the formulation of

rules and regulations. And as in the area of *Brady-Giglio*, so too in these other advocatory areas is absolute immunity for the supervising prosecutor necessary to preserve and foster the uninhibited professional exercise of prosecution advocacy which *Imbler* seeks to achieve. Included within the administrative umbrella would be only supervisory decisions on hiring, discharging and promoting personnel, and determining budget, areas that are not intimately associated with the advocacy function. *See Forrester v. White*, 484 U.S. 219, 229 (1981) ("Judge White was acting in an administrative capacity when he demoted and discharged Forrester . . . . The decision[] at issue . . . [was] not . . . [itself] judicial or adjudicative . . . . a judge who hires and fires a probation officer cannot meaningfully be distinguished from a district attorney who hires and fires assistant district attorneys . . . ."); *See also, e.g., Ceballos v. Garcetti,* 361 F.3d 1168, 1184-1185 (9th Cir. 2004) (noting District Attorney's decision concerning prosecutor's promotion, demotion and transfer fell within District Attorney's "administrative function," whereas removal of prosecutor from murder case was conduct concerning the prosecutorial function under *Imbler*), *rev'd on other grds*, 547 U.S. 410 (2006) (explaining First Amendment does not shield prosecutor from discipline by DA employer for employee's speech made pursuant to professional duties).

A bright-line rule establishing that "administrative" actions by a supervising prosecutor to which absolute immunity will not attach are limited to personnel and budget serves several beneficial purposes. At a minimum, the Court should hold that when, as in the present case, the

supervising prosecutor through training and policy directs the conduct of the prosecutor in the courtroom absolute immunity attaches to the supervisor's conduct. First, a clear rule conforms to the modern day reality in prosecutor's offices that other than in the subjects of personnel and budget, or investigatory activities, the supervising prosecutor performs an exclusive advocacy function, directing subordinates in all aspects of the initiation and pursuit of criminal prosecutions. Second, such a rule will prevent aberrant circuit court decisions, such as *Goldstein*, that misconstrue *Imbler's* purpose, allowing for its easy circumvention by defendants through pleading charges against supervising prosecutors and thus permitting the very dangers to the prosecution function *Imbler* seeks to avoid. Third, and related to the second, clearly defining the "administrative" exception will deter further circumvention of *Imbler*, and its continued erosion, by defendants who charge a supervising prosecutor for failure to train or supervise for activity outside the *Brady-Giglio* context that is also plainly advocatory in nature. *See, e.g., Haynesworth v. Miller*, 820 F.2d at 1268-1271. Fourth, continued uncertainty as to the scope of the "administrative" exception will be removed, thereby promoting the uninhibited and robust exercise of professional judgment by the supervising prosecutor in all phases of his or her advocatory role, achieving the purpose of *Imbler*, and preventing lower court decisions, such as *Goldstein*, that threaten that function.

c. *Goldstein's* Misapplication Of *Imbler's* Functional Approach To Determining Petitioner's Absolute Immunity From Civil Suit

Requires Reversal Of The Circuit Court's Decision.

Goldstein correctly articulated the proper standard and starting point of analysis for determining the immunity question: "the critical factor remains the *nature* of the challenged policy and whether it falls within the prosecutor's judicial function . . . ." *Goldstein*, 481 F.3d at 1175 (italics supplied). But, the Circuit Court incorrectly assessed the nature of that function. With little discussion, and virtually no analysis of the *Giglio* decision itself, the Court concluded that the establishment of training and policy in a prosecutor's office to comply with *Brady-Giglio* is an "administrative" function because it only "to some degree related to trial preparation . . .," *Goldstein*, 481 F.3d at 1176 (quoting from *Burns v. Reed*, 500 U.S. at 495) (internal quotation marks omitted), and was more concerned with "how the District Attorney's Office was managed." *Id.* Consequently, the court deemed the supervising prosecutor's conduct as managerial, not advocatory, similar to other administrative exercises as hiring, demoting, and discharging prosecutors, holding press conferences, and making budgetary decisions.

As explained in section b., however, *Goldstein's* reasoning is flawed because it misperceived the advocatory function of the training and policy-making involved (the implementation of the *Brady-Giglio* obligation), and thus its relationship to the prosecution function that *Imbler* reserves for absolute immunity.

More fundamentally, *Goldstein* eviscerates *Imbler* as controlling precedent, for a defendant who wants to sue a prosecutor for conduct in his or her advocatory role knows that the circuit court will permit the suit if it is pleaded as one involving a failure to train or supervise. Yet, permitting only qualified immunity to attach to the actions of the supervisor realizes the very dangers to the effective performance of the advocatory function *Imbler* deemed absolute immunity necessary to avoid. *See Imbler,* 424 U.S. at 425-427, and 427 n.25.

First, qualified as opposed to absolute immunity poses the same danger of harassing lawsuits that *Imbler* found inimical to effective prosecution advocacy. Every §1983 suit against a prosecutor in the initiation of a criminal case and the conduct of it that is normally barred at the outset under *Imbler* is metamorphosed into a viable civil claim through charging a failure to train, supervise, or, as in the present case, to set adequate policy by the supervising prosecutors. *See, e.g., Lawson v. City of New York*, No. 00-2704, 2002 U.S. Dist. LEXIS 10705, at *6 (S.D.N.Y. 2002) (concluding failure to train claim against DA supervisor is improper circumvention of absolute immunity bar under *Imbler*); *Gil v. County of Suffolk*, No. 06-1683, 2007 U.S. Dist. LEXIS 49645, at *9 (E.D.N.Y. 2007) (same as *Lawson*).[2]

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[2] As this Court has observed, such litigation is particularly dangerous in this area:

> "The judicial process is an arena of open conflict, and in virtually every case there is, if not always a winner, at least one loser. It is inevitable that many of those will pin

(continued...)

The danger of personal liability for "even the honest prosecutor . . .," *Imbler*, 424 U.S. at 425, is great since often, as in the present case, such civil claims challenge conduct that occurred years ago when the constitutional right may not have been as clearly established as it is today, but yet when viewed under a more modern judicial prism reflects a right clearly established to supplant qualified immunity. *See generally Harlow v. Fitzgerald*, 457 U.S. 800, 816 and 818 (1982) (defining qualified immunity as shielding "government officials performing discretionary functions . . ." from civil liability if "their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."). What a prosecutor failed to train on and set policy for twenty years ago may, from today's vantage point, seem far more shocking.

Civil lawsuits against supervising prosecutors will equally divert, if not more so (because they affect so many more cases and are directed against officials who have many responsibilities), the prosecuting office's "energy and attention . . . from the pressing duty of enforcing the criminal law," *Imbler*, 424 U.S. at 425, as civil lawsuits against line prosecutors. *Cf. Buckley v. Fitzsimmons*, 509 U.S. at 283 ("Allowing the avoidance of absolute immunity through that pleading mechanism would undermine in large part

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(...continued)

> the blame on judges, prosecutors, or witnesses and will bring suit against them in an effort to relitigate the underlying conflict."

Mitchell v. Forsyth, 472 U.S. at 521-522 (citation omitted).

the protections that we found necessary in Imbler . . . .") (Kennedy, White, Souter, J.J., and Rehnquist, C.J., concurring in part and dissenting in part).

Supervising prosecutors must possess the appropriate latitude to exercise professional judgment in determining those policies, procedures, and training they deem necessary to effectively implement the *Brady-Giglio* obligation in light of their particular experience, the needs of their office, and the law enforcement community the office serves. *See Imbler*, 424 U.S. at 424-25 ("The public trust of the prosecutor's office would suffer if he were constrained in making every decision by the consequences in terms of his own potential liability in a suit for damages."); *Haynesworth v. Miller*, 820 F.2d at 1270 n.199 (according qualified immunity "to promulgation of standards of prosecution . . . would deter formulation of policy, thereby jeopardizing individual defendants and the criminal justice system as a whole.").

Uninhibited decision making in this area of the prosecution function is important because the supervising prosecutor's training and policy-making role is inextricably interwoven with the advocacy function in all phases of criminal prosecution, and hence, in the judicial process. In the context of *Brady*, the supervising prosecutor's professional judgment manifests itself in determining such advocatory decisions as whether evidence falls within *Brady*, its affect on potential, pending or completed criminal cases, whether to use informants as witnesses and under what circumstances, and how to ensure that all relevant *Brady-Giglio* evidence, when informants are utilized, is collected and disseminated

intra-office. These determinations are often based upon interpretation of sometimes complex case law and other legal rules; for instance, the law governing what *Brady* and its progeny require to be disclosed has evolved considerably over the years. Attaching personal civil liability to career prosecutors for an alleged previous failure to train or to set policy, sometimes made years before, thus necessarily involves them in complex and potentially unfair litigation that will chill the exercise of their best professional judgment. On the other hand, absolute immunity facilitates the exercise of that judgment objectively and dispassionately, uncolored by fear of personal civil liability.

Nor is any concrete benefit gained by bestowing qualified immunity to the supervisor in the large office for failing to train or set policy, or doing so adequately, while attaching absolute immunity to his or her counterpart in the small office who actually made the decision to disclose in a particular case. That result is "incongruous," *Burns v. Reed*, 500 U.S. at 495; *Cf. also Buckley v. Fitzsimmons*, 509 U.S. at 275. Further, some courts have recognized a defendant's civil redress against the municipality under §1983 for prosecutorial misconduct, *see e.g.*, *Walker v. City of New York*, 974 F.2d 293 (2d Cir. 1993), *cert. denied*, 507 U.S. 961 (1993), a remedy that supplies a deterrent notwithstanding absolute immunity for personal civil liability of the trial and supervising prosecutors. *Cf. generally Bogan v. Scott-Harris*, 523 U.S. 44, 53 (1998) ("certain deterrents to legislative abuse may be greater at the local level ... [m]unicipalities themselves can be held liable for constitutional violations . . . .")(citing *Monell v. Department of Social Services*, 436 U.S. 658 (1978)).

Other checks on abuse moreover exist on the errant prosecutors: the judiciary reviews of the criminal proceedings on direct appeal and collaterally, and in the egregious case, the attorney is subject to professional discipline or criminal sanction. *See Imbler*, 424 U.S. at 429-30.

Second, absolute immunity for the supervising prosecutor's policy formulation and training on the advocacy function *facilitates*, and *promotes*, disclosure of all discoverable evidence, which, in turn, promotes the truth-seeking aspect of the judicial process. *See Imbler*, 424 U.S. at 424, 427 and n.25. In this regard, the supervising prosecutor's impact on the judicial process is magnified many times compared to the role of the prosecutor in the single case. Yet, *Imbler* protects the latter; but for the same compelling reasons it must also protect the former who directs the advocatory conduct. Absolute immunity for the supervising prosecutor derives "not from an exaggerated esteem for those who perform [that job], and certainly not from a desire to shield abuses of office, but because any lesser degree of immunity could impair the judicial process itself." *Malley v. Briggs*, 475 U.S. 335, 342 (1986) (concluding that police officer presenting arrest warrant application is entitled to qualified immunity, as act is unlike prosecutor who obtains indictment which starts the judicial phase of criminal proceedings) (citation omitted).

That the decisions of the supervising prosecutor impacts many criminal cases does not alter the advocatory nature of the decision itself, which remains unchanged whether exercised in a single case or many. *See, e.g., Haynesworth v. Miller*,

820 F.2d at 1269; *Beck v. Phillips*, 685 N.W.2d at 644 ("the mere fact a prosecutor makes his or her decision with respect to a class of cases—present and future—as opposed to merely a present case is immaterial, and does not render the action 'administrative' as opposed to 'quasi-judicial,' i.e. absolutely immune.") (citations omitted). Indeed, the intimate relationship between the advocacy function and the supervising prosecutor's policy making and training role has been more generally recognized. *See A.B.A. Standards* at §3-2.5 (a[i]-[ii])-(b) ("Prosecutor's Handbook; Policy Guidelines and Procedures"), at 30 *available at* htpp://www.abanet.org/crimjust/standards/prosecutionfunction.pdf. (June 25, 2008). Absolute immunity will encourage it.

But, according only qualified immunity to supervisory personnel with its greater risk for personal liability will inhibit training and policy formulation in so far as trainers will insist on total disclosure where the law does not require it, at the possible expense of witness safety and the efficient prosecution of cases, as prosecutors will fail to exercise their discretion from fear of incurring civil liability. *Cf. Haynesworth v. Miller*, 820 F.2d at 1270 n.199 (rejecting a civil defendant's challenge to absolute immunity for a supervising prosecutor for allegedly promulgating an office policy of retaliatory prosecution of individuals who refused to waive civil suits against arresting officers; "[t]he dynamics of the situation suggest that prosecutors will not only be timid about formulating policy-making, but also that they may forego policy-making altogether.").

Third, and equally as significant as the other reasons for absolute immunity, it will encourage the

exercise of the prosecutor's duty "to bring to the attention of the court or of proper officials all significant evidence suggestive of innocence or mitigation." *Imbler*, 424 U.S. at 427 n.25. The exercise of that duty may be "dampene[d]" if it poses "substantial danger of liability . . .," *id.* at 425, to his or her supervising prosecutor, the chief assistant, or the District Attorney for their failure to train, or to do so adequately, or for poor policy making. Absolute immunity removes that deterrence. *See id.* at 424 U.S. at 427 (noting Judges' decision "should not be blurred by even the subconscious knowledge . . ." that a result against the prosecutor would result in liability).

Absolute immunity will also allow prosecutors' offices to retain their most experienced and skillful personnel. *See A.B.A. Standards* at §3-2.3 (a)-(e) ("Assuring High Standards of Professional Skill"), at 24 (3d ed. 1993) (public prosecution needs promoting "continuity of service and broad experience in all phases of the prosecution function.") *available at* http://www.abanet.org/crimjust/standards/prosecutionfunction.pdf (June 25, 2008). The risk of civil liability will discourage the most talented and experienced prosecutors from assuming supervisory positions. Seasoned prosecutors will either leave an office or remain as a line prosecutor, while less qualified individuals attain supervisory positions whose ascension would otherwise have been blocked. Such is inimical to the efficient and competent performance of the prosecution function that *Imbler* seeks to promote and preserve. *See Imbler*, 424 U.S. at 424-425; *Bogan v. Scott-Harris*, 523 U.S. at 52 (according absolute immunity to local legislatures, in

part, because "threat of liability may significantly deter service in local government . . . .").

CONCLUSION

A supervising prosecutor's, or chief advocate's office-wide training, policy-making and supervision to ensure compliance with the *Brady-Giglio* rule is, in light of the nature of that constitutional obligation and its intimate association with the advocacy function, conduct that is inextricably involved with a prosecutor's office's "initiation of a prosecution, the presentation of [its] case in court [and] actions preparatory for those functions." *Buckley v. Fitzsimmons*, 509 U.S. at 278. As such, the conduct is within the scope of the prosecutor's duties as advocate that justifies absolute immunity. The nature of this conduct is unlike those supervisory decisions on hiring, promoting and firing or on formulating budget, ones that in form and substance are "administrative," or on activities of police and prosecutors well before arrest and probable cause, ones that fall within the investigative line. A supervising prosecutor's decisions through policy and training that direct the preparation, initiation and the pursuit of criminal cases in the courtroom, as in the development of rules and procedures for office-wide implementation of *Brady-Giglio*, must be clothed with absolute immunity to avoid impairment of both the prosecutor's advocacy function and the judicial process.

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